No. 06-__

IN THE

Supreme Court of the United States

MARYLAND RECLAMATION, INC.,
Petitioner,

v.

RAMBLEWOOD HOMEOWNER'S ASSOCIATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Maryland Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On November 17, 1992, the following provision was added to Section 27-406 of the Prince George's County Zoning Ordinance:

> (h) . . . that when approving a special exception for a rubble fill, the **District Council shall find that the proposed use is necessary to serve the projected growth of Prince George's County.**

Thereafter, on April 26, 2005, Section 27-406(h) of the Prince George's County Zoning Ordinance was further "clarified" when the District Council added the following provision:

> that when approving a special exception for a rubble fill, the District Council shall find that the proposed use is necessary to serve the projected growth of Prince George's County, **by applicant proof that without the proposed use the County's projected growth will be adversely affected. Proof of a future deficit in or absence of County-wide fill capacity does not by itself constitute proof that a proposed fill is necessary to serve the projected growth in the County.**

The question thus presented is: Whether section 27-406(h) of the Prince George's County Zoning Ordinance, which was enacted for the sole purpose of prohibiting citizens of other states from using rubble fill capacity in Prince George's County and restricting the use of rubble fill capacity in the County solely to citizens of Prince George's County, by conditioning approval of special exceptions for a rubble fill upon a determination that the proposed rubble fill is needed to serve the projected growth in Prince George's County, violates the Commerce Clause of Article I, section 8 of the United States Constitution?

Additionally, section 27-133 (f)(1) of the Prince George's County Zoning Ordinance establishes that the District Council "shall exercise original jurisdiction" in deciding whether

to approve a special exception for a rubble fill. Specifically, §27-132(f)(1) states:

> (f) Jurisdiction
>
> > (1) In deciding an appeal to the District Council, or Council election to review a decision made the Zoning Hearing Examiner or the Planning Board, Council shall exercise original jurisdiction.

In the instant matter, the District Council determined that petitioner's proposed rubble fill would cause adverse effects greater than would be anticipated at other locations in the R-R Zone prior to the evidence being presented during oral argument. As such the other question presented is whether the District Council violated the petitioner's Due Process Rights guaranteed them in the Fourteenth Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights when the District Council decided that petitioner's proposed rubble fill would cause adverse effects greater than would be anticipated at other locations in the Rural Residential Zone prior to hearing the evidence in oral argument.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Maryland Reclamation, Inc., requests that a writ of certiorari issue to review the judgment of the Maryland Court of Appeals entered on December 15, 2006, in the case of *Maryland Reclamation, LLC v. Ramblewood Homeowner's Association, et al., Petition Docket No. 297, September Term, 2006, No. 812, September Term, 2005 Court of Special Appeals.* That judgment finally denied Maryland Reclamation's Petition for Judicial Review filed originally in the Circuit Court for Prince George's County, Maryland pursuant to Maryland Annotated Code. In said petition Maryland Reclamation, LLC asked the court to determine whether or not the requirement of § 27-406(h) of the Prince George's County Zoning Ordinance violated the interstate commerce clause of the United States Constitution by requiring the applicant to prove that the proposed "Sanitary Landfill"

(Rubble Fill) was necessary to accommodate the projected growth within the County and whether the Prince George's County Council, sitting as the District Council, (hereinafter District Council) violated the petitioner's due process rights by deciding the outcome of their zoning "special exception" application appeal prior to hearing oral arguments.

OPINIONS BELOW

The Maryland Court of Appeals has issued an Order in this case denying Maryland Reclamation's Petition for Writ for Certiorari, a copy of which appears in Appendix A to this petition at page 1. The Maryland Court of Appeals has also issued an Order in this case denying petitioner's Motion for Reconsideration of Denial of Petitioner for Writ of Certiorari, a copy of which appears in Appendix B to this petition at page 2. The Maryland Court of Special Appeals has issued an unreported opinion in this case, a copy of which appears in Appendix C to this petition at page 3. The Circuit Court for Prince George's County, Maryland has also issued an unreported opinion in this case, a copy of which appears in Appendix D to this petition at page 23. The Circuit Court for Prince George's County, Maryland has also issued an unreported Order of Remand in this case, a copy of which appears in Appendix E to this petition at page 28.

JURISDICTION

The Order of the Maryland Court of Appeals was entered on December 15, 2006. The Jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Commerce Clause of Article I, section 8 of the United States Constitution. Such section reads in pertinent parts as follows:

> The Congress shall have Power To lay and collect Taxes, Duties, Imports and Exercise, to pay the Debts and pro-

> vide for the common Defence and general Welfare of the United States; but all Duties, Imports and Exercises shall be uniform throughout the United States;
>
> To borrow Money on the credit of the United States;
>
> To regulate Commerce with foreign Nations, and among the several States and with Indian Tribes; . . . .

This case also involves the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights. The Due Process Clause of the Fourteenth Amendment of the United States Constitution reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any within its jurisdiction the equal protection of the law.

Article 24 of the Maryland Declaration of Rights reads as follows:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner, destroyed, or deprived of his life, liberty or property, but by judgment of his peers, or by the Law of the land.

It may also be found in Md. Code Ann. Const. Art. 24 (2003 Replacement Vol.).

STATEMENT

Petitioner, Maryland Reclamation LLC, is a limited liability company organized under the laws of the State of Maryland. Petitioner is also the owner of a 131.5324 acres site in

Prince George's County, Maryland (hereinafter the property). Respondent Ramblewood Homeowners Association is a corporation organized under the laws of the State of Maryland and represents a single family residential community within a one mile radius of Petitioner's property. Respondent Prince George's County Council, sitting as the District Council, is body corporate and politic and a charted municipal corporation under the Maryland Annotated Code Article 23A and 23B.

On or about April 4, 1999, Petitioner filed Special Exception Application 4347 (hereinafter SE. 4347) for permission to convert the approved active surface mining operation and Class III grading operation on the property into a rubble fill. The rubble fill application consisted of a west mound, 88.6 acres with a maximum elevation of 250 feet and an east mound, 42.9 acres with a maximum elevation of 160 feet. Moreover, it should also be noted that both of the aforementioned mound requested in the rubble fill application are the exact same dimensions as those previously approved for the Class III fill which is currently in operation.

On or about February 25, 2000, the Maryland National Park & Planning Commission issued its Technical Staff Report recommending approval of SE. 4347 with conditions. On July 20, 2000, the Planning Board finished the public hearing on SE.4347 and recommended approval with conditions. After eleven hearings beginning on January 31, 2001, and continuing through August 14, 2001, the Chief Zoning Hearing Examiner (hereinafter ZHE) for Prince George's County issued a decision approving SE. 4347 (for the west mound) with conditions. The petitioner and the respondent both filed Exceptions to the ZHE's decision.

On or about June 10, 2002, the Prince George's County Council, sitting as the District Council, (hereinafter District Council) without holding oral argument on the parties Exceptions decided to remand the case back to the

ZHE. On June 12, 2002, without having reviewed any testimony or exhibits on the application or hearing oral arguments thereon, the District Council issued an Order of Remand which stated in pertinent parts:

> **5. The record in this case demonstrates substantial adverse impacts to adjacent properties and the surrounding area, if a rubble fill is approved on the subject property.** (Emphasis added) This remand is ordered only because S.E. 4408, an application for a rubble fill expansion and extension on property less than a mile from the subject property, has been remanded to reexamine the necessity issue in light of the decision in CAL 01-21330. The necessity issue must be reviewed by the Examiner in both S.E. 4408 and S.E. 4347, before the District Council can decide them. (E.P1-P5)

Thereafter, the Technical Staff and the Appellee provided additional analyses of need and the ZHE held two additional hearings. On March 3, 2003, the parties submitted written closing arguments, the record was closed and the ZHE took the application under advisement. On May 1, 2003, the ZHE issued her decision on remand approving SE. 4347 (for the west mound) with conditions. Again, both parties filed Exceptions to the ZHE's decision. On or about September 22, 2003, the District Council heard oral argument on the Exceptions filed in SE. 4347 and denied Appellee's application for the following relevant reasons:

> 14. The District Council further concludes, as argued by opposition residents, particularly those in the Ramblewood and Robshire Acres communities, that the applicant did not prove, as is required by § 27-317 of the Zoning Ordinance, that the proposed rubble fill at this location will not cause adverse effects greater than would be anticipated at other locations in the R-R Zone. This proposed S.E. 4347 site is much closer to established residential subdivisions than other R-R sites, including the S.E 4408 site recently approved by the

District Council. Visual, noise, and odor effects from the rubble fill at the subject location will be much greater than would be anticipated at the S.E 4408 property and other R-R zone locations. This proof in the record offers an additional reason to deny the application.

15. Because the applicant did not prove that its proposed rubble fill facility is "necessary to serve the projected growth in Prince George's County," § 27-406 (h), and because the applicant did not show that anticipated adverse traffic, noise, odor, and visual effects at this location will be no worse than they would be at other R-R locations in the County, § 27-317, the application must be denied.

Thereafter, Maryland Reclamation filed a timely Petition for Judicial Review. On or about July 16, 2000, the Circuit Court heard oral argument on Respondents' Petition for Judicial Review. At the conclusion of the oral argument the Circuit Court took the case under advisement to issue a written decision. On or about July 21, 2004, the Circuit Court issued an Opinion and Order of the Court remanding the case back to "the District Council for it to explain its rationale for using what the court deemed to be an unwarranted interpretation of § 27-406(h) (the "necessity" requirement) of the Prince George's County Zoning Ordinance." On or about November 8, 2004, the respondent District Council readopted its Order of Denial dated September 25, 2003, and again denied Maryland Reclamation's Special Exception application.

Subsequently, on or about July April 29, 2005, the Circuit Court for Prince George's County again heard oral argument on this matter and took the case under advisement. On or about May 3, 2005, the Circuit Court issued and Opinion and Order remanding the case back to the District Council for further proceedings "to consider whether the applicant's proposed rubble fill will alleviate some of the County's projected need" for rubble fill capacity. Thereafter, on or about June 1,

2005, and June 10, 2005, the Respondents filed timely Notices of Appeal.

On February 9, 2006, the Court of Special Appeals held oral argument and took the case under advisement. On June 22, 2006, the Court of Special Appeals issued an unreported opinion holding "that there was sufficient facts with respect to disproportionately adverse effects, and that there was substantial evidence to support those findings." On July 24, 2006, the Court of Special Appeals issued its Mandate.

On August 8, 2006, the Petitioner filed a timely Petition for Writ of Certiorari to the Maryland Court of Appeals. On October 18, 2006, the Maryland Court of Appeals issued an Order denying the petition. On November 17, 2006, the petitioner filed a timely Motion for Reconsideration of the Order Deny Certiorari. On December 15, 2006, the Court of Appeals issued an Order denying the petitioner's Motion for Reconsideration.

REASONS FOR GRANTING THE WRIT

This case concerns the rights of Maryland Reclamation LLC to own and operate a rubble fill in Prince George's County, Maryland that is able to receive rubble from the entire Baltimore-Washington Metropolitan region without a protective local ordinance established to reserve rubble fill capacity for in-County rubble. The illegal and unconstitutional motives for the necessity provision in § 27-406 of the Prince George's County Zoning Ordinance is clearly demonstrated in the legislative history of the amendment. This zoning legislation added subsections (g) and (h), at the end of § 27-406. The "agenda item summary" for Council Bill 85-1992, approved by the District Council on November 17, 1992 states the following as the reason for the bill:

> There are certain special exception uses, including gas stations and planned retirement communities, for which a finding of need within a particular service area must be

> made. This legislation requires a similar finding for the approval of rubble fills. Specifically, an analysis must be included in the Technical Staff Report, and the District Council must use this information to determine whether the proposed use is necessary to serve the needs of Prince George's County. Appendix F, pg 34(a) (emphasis added).

The report of the Council's Planning, Zoning and Economic Development Committee, on the first page of the agenda item summary, gives the reason for the legislation and the committee's favorable (5-0) vote as:

> Staff explained that this legislation is intended to ensure that the rubble fills approved in Prince George's County are necessary to serve the needs of this County, and not the needs of the entire region. The sponsor [of the legislation, Kirk Wineland] added that since Federal law prohibits the county from restricting the use of privately-owned rubble fills, requiring a needs analysis prior to special exception approval will help preserve this resource and protect the citizens of the County. Appendix F; pg 34(a) (emphasis added).

Thus, it is clear that CB-85-1992 was enacted for the sole purpose of preserving rubble fill space for the needs of Prince George's County, "not the needs of the entire region."

Section 27-406 of the Prince George's County Zoning Ordinance deprives individuals in Washington D.C., Northern Virginia and other counties in Maryland of available rubble fill capacity and rubble fill applicants, like the Petitioner, are deprived of a right to offer their needed service to out-of-state rubble fill users until such time that a need for rubble in Prince George's County arises. Discrimination against rubble from Washington D.C., Northern Virginia and other counties in Maryland with reference to the needs analysis, in favor of Prince George's County rubble is per se invalid, except in a narrow category of cases (none of which apply to the instant matter) in which the municipality can demonstrate under

strict scrutiny, that it has no other means to advance a legitimate local interest. *Maine v. Taylor*, 477 U.S. 131, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986) (upholding Maine's ban on the import of non-indigenous fish, which was causing the spread of parasites and the adulteration of its native fish population).

Moreover, banning of out-of-county rubble in the determination of need required by § 27-406 of the Prince George's County Zoning Ordinance implicates the Commerce Clause. This Court in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389-90; 114 S. Ct. 1677, 128 L. Ed. 399 (1994), explained that:

> as solid waste output continue to apace and land fill capacity becomes more costly and scarce, state and local governments are expending significant resources to develop trash control systems that are efficient, lawful and protective of the environment. The difficulty of their task is evident from the number of recent cases that we have heard involving waste transfer and treatment. . . The case decided today, while perhaps a small new chapter in that course of decisions, rests nevertheless upon well-settled principles of our Commerce Clause jurisprudence. (citations omitted)

The Commerce Clause, U.S. Const. art. I § 8, c1.3, gives Congress exclusive power over interstate commerce. It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1., 31, 81 L. Ed. 893, 57 S.Ct. 615 (1937). The Commerce Clause has also been interpreted to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of state. *City of Philadelphia v. New Jersey*, 437 U.S. 617; 98 S. Ct. 2531; 57 L. Ed. 475 (1978) (striking down a New Jersey statue that prohibited the import of solid waste); *Hughes v. Oklahoma*,

441 U.S. 322, 60 L. Ed. 2d. 250, 99 S. Ct. 1727 (1979) (striking down Oklahoma law that prohibited the export of natural minnows). As such, in the case sub judice there should be no doubt that since § 27-406 only focuses on in-county rubble and excludes from the analysis other rubble that could potentially be brought in from surrounding jurisdictions, the constitutional protection of the Commerce Clause is available. *Philadelphia, infra*; *Bowman v. Chicago & Northwest R. Co.*, 125 U.S. 465.

In determining whether to grant Certiorari to address the Prince George's County needs provision, this Court's decision in *C&A Carbone, Inc., v. Town of Clarkstown*, 511 U.S. 383, 389-90; 114 S. Ct. 1677, 128 L. Ed. 399 (1994) may be is helpful. In *Carbone*, the Town of Clarktown adopted a trash flow control ordinance requiring all non-hazardous solid waste within the town to be deposited a one specific transfer station prior to export. The purpose and effect of the ordinance was to allow the owner of the transfer station to charge a tipping fee on all trash which originated in the town. After learning that recyclers in the town were not complying with the ordinance the town filed suit in state court. The case eventually made its way to the United States Supreme Court which explained that in determining the validity and constitutionality of local laws which infringe upon the Commerce Clause, case law has produced two lines of cases: "first, whether the ordinance discriminates against interstate commerce, Philadelphia, 437 U.S. at 624; and second, whether the ordinance imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits,' *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970). Moreover, if the reviewing court finds that the ordinance discriminates against interstate commerce, there is no need to apply the *Pike* test.

In the instant matter, Section 27-406 (g) and (h) of the Prince George's County Zoning Ordinance are illegal and un-

constitutional infringements on interstate commerce. Specifically, § 27-406 requires approval of a rubble fill application only upon a showing that there exist an actual deficit of rubble capacity needed for Prince George's County rubble. The Petitioner should not be denied his right to provide available rubble capacity to the entire Baltimore-Washington area until there is a need for said capacity for Prince George's County. Additionally, public service projects like the construction of the new Wilson Bridge should not be hampered by a lack of available rubble fill capacity so that the Prince George's County Council can conserve rubble capacity on privately owned property for a public use. Stated differently, the problem with 27-406 is that it hoards local resources, (i.e. available rubble fill capacity) for the benefit of local residents and businesses. Section 27-406 is just the type of local processing requirement that the United States Supreme Court has long held invalid. *See Minnesota v. Barber*, 136 U.S. 313, 34 L. Ed. 455, 10. S. Ct. 862 (1890) (striking down a Minnesota statute that required any meat sold within the state, to be examined by a state inspector.), *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970) (striking down an Arizona statute that required all Arizona-grown cantaloupes to be packed in state prior to exporting).

This case also concerns the rights of Maryland Reclamation LLC to a fair hearing under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights. Specifically, the District Council violated the petitioner's Due Process Rights when it decided that petitioner's proposed rubble fill would cause adverse effects greater than would be anticipated at other locations in the Rural Residential Zone prior to hearing any testimony or any evidence being enter into the record.

Section 27-133 (f)(1) of the Prince George's County Zoning Ordinance establishes that the County Council "shall

exercise original jurisdiction" in deciding whether to approve Petitioner's special exception for a rubble fill. Specifically, §27-132(f)(1) states:

> (f) Jurisdiction
>
> > (1) In deciding an appeal to the District Council, or Council election to review a decision made by the Zoning Hearing Examiner or the Planning Board, Council shall exercise original jurisdiction.

Thus, there should be no doubt that the District Council's review of the Zoning Hearing Examiner's decision was de novo, and that the respondent District Council violated the Petitioner's due process right by stating in the Order of Remand prior to any evidence being placed in the record that "the record in this case demonstrates substantial adverse impacts to adjacent properties and the surrounding area, if a rubble fill is approved on the subject property. (Emphasis added)

Maryland law is clear that unless otherwise limited by statute or court rule, a "de novo hearing" of administrative decision by reviewing boards is an entirely new hearing at which time all aspects of the case should be heard anew as if no decision had been previously rendered. *Halle Cos. v. Crofton Civic Ass'n*, 339 Md 131, 661 A.2d 682 (1994); *Boehm v. Anne Arundel County*, 54 Md. App. 497, 459 A.2d 590 (1983). Moreover, as the Boehm Court stated, an excellent position, of what a *"de novo"* hearing embraces can be found in 2 Am. Jur.2d Administrative Law § 698 (1962). That section provides:

> *A trial or hearing "de novo" means hying the matter anew the same as if it had not been heard before and as if no decision had been previously rendered. Thus, it is said that where a statute provides that an appeal shall be heard de novo such a hearing is in no sense a review of the hearing previously held, but is a complete trial of the controversy, the same as if no previous hearing had*

ever been held, especially where the hearing is in a court of general, original juris-diction. Where a statute provides for a trial de novo and does not provide that the findings of the administrative agency shall be conclusive or of any force, the whole matter is opened up for consideration on appeal as if the proceeding had been originally brought in the reviewing court. Trial in court is not an appellate proceeding where the statute provides for a suit to set aside an award and for determination of the issues upon trial de novo. Even though designated an "appeal," a review in which the court is not confined to a mere re-examination of the case as heard before the administrative agency but hears the case de novo on the record before the agency and such further evidence as to be regarded as an original proceeding. Thus, on a trial or hearing de novo it has been held immaterial what errors or irregularities or invasion of constitutional rights took place in the initial proceedings.

A trial de novo or a de novo hearing of the matter under "review" may be new and different from the trial or hearing before the administrative agency in respect of one or more, or all, of the following: evidence heard or facts considered, especially where the administrative agency did not afford a hearing; issues raised; findings made; grounds for decision; and the view of the evidence heard or facts considered, the opinion as to the preponderance of the evidence, and the proper judgment to be reached or action to be taken in accordance with the evidence or facts as thus viewed. The last element would appear to be the essential element of a true trial or hearing de novo and may be embraced by general statements of a court that a trial de novo is involved.

Not all the foregoing elements of a trial or hearing de novo are necessarily made operative by the fact that new and additional evidence is admitted in court, at least in the view of some courts; and not all of the elements are made operative as to all types of situations by the fact that a statute expressly authorizes or requires a trial or

> hearing de novo. The scope of de novo review of the actions of administrative agencies, or the significance of a trial designated as a trial de novo in such case, may vary with the subject matter of the review of the function of the agency, and may be tested in the light of the nature and scope of the remedy through which such trial is made available and the proper distribution of governmental powers among the various branches of government under the Constitution. Thus, there may be a trial de novo upon the record as some statutes expressly provide, and a trial de novo in which the court must consider the record before the agency, accord a presumption of correctness or proper deference to the agency findings and conclusion, and a refrain, at least in matters other than judicial, from substituting its discretion or judgment for that of the administrative agency. (footnotes omitted) (emphasis supplied).

It is also well established in Maryland law that whether constitutional or statutory requirements or elements of fair play and impartiality have been violated in an administrative hearing should be decided on a case by case basis. *Hyson v. Montgomery County Council*, 242 Md. 55, 217 A.2d 578 (1966), In addressing due process within the context of administrative hearings, Professor Schwartz, in his treatise on Administrative Law, states:

> The literal meaning of due process is *fair procedure.*
>
> * * * *
>
> Before an agency takes action which adversely affects particular rights and obligations, those affected must be given notice and an opportunity to present their side of the case in a full and fair hearing. But more is required of agencies than minimal compliance with the "hear the other side" principle. When due process requires a hearing, it requires many of the elements of a "trial-type" hearing. Building upon the due process foundation, the courts have constructed an imposing edifice of formal

adjudicatory procedure. The consequence has been a virtual judicialization of the administrative process. Administrative procedure has acquired many of the attributes of courtroom procedure.

The rights required by due process before an administrative agency typically include the right to:

(1) Notice, including an adequate formulation of the subjects and issues involved in the case;

(2) Present evidence (both testimony and documents) and argument;

(3) Rebut adverse evidence, through cross-examination and other appropriate means;

(4) Appear with counsel

(5) **Have the decision based only upon evidence introduce into the record of the hearing;** (Emphasis added) and

(6) Have a complete record, which consists of a transcript of the testimony and arguments, together with the documentary evidence and all other papers filed in the proceeding. B. Schwartz, Administrative Law § 67 (1976)

In the instant matter, the Petitioner was entitled to a de novo appeal on the record and procedural due process required that Respondent District Council refrain from making a decision concerning the alleged cumulative adverse effects of the proposed special exception until such time that oral argument on the application was held. However, it is clear that the decision by the District Council to deny Petitioner's rubble fill application on September 22, 2003, was not based on any evidence introduced into the record of the hearing. A review of the Order of Remand from June 12, 2002, makes clear that the District Council had already decided to deny Petitioner's rubble fill application before it heard the first scintilla of evidence. Specifically, the District Council de-

cided and stated in the aforementioned Order of Remand almost 15 months earlier, and prior to having any evidence introduced in the record that **"THE RECORD IN THIS CASE DEMONSTRATES SUBSTANTIAL ADVERSE IMPACTS TO ADJACENT PROPERTIES AND THE SURROUNDING AREA, IF A RUBBLE FILL IS APPROVED ON THE SUBJECT PROPERTY."** (Emphasis added) Consequentially, there should be no doubt that the District Council decided this case prior to holding oral argument on September 22, 2003 and Petitioner's was denied its due process of law.

CONCLUSION

WHEREFORE, Petitioner requests that a writ of certiorari issue from this Honorable Court to review the judgment of the Court of Appeals of Maryland in the case *Maryland Reclamation, LLC v. Ramblewood Homeowner's Association, et al., Petition Docket No. 297, September Term, 2006, No. 812, September Term, 2005 Court of Special Appeals.* In the event that the petition is granted, petitioner requests that the judgment of the Maryland Court of Special Appeals be reversed, and that the cause be remanded, and that the court below be directed to approve the petitioner's application for a rubble fill.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 297
September Term, 2006
(No. 812, Sept. Term, 2005 Court of Special Appeals)

MARYLAND RECLAMATION, LLC,

v.

RAMBLEWOOD HOMEOWNER'S ASSOCIATION, *et al.*

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

DATE: October 18, 2006

APPENDIX B

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 297
September Term, 2006
(No. 812, Sept. Term, 2005 Court of Special Appeals)

MARYLAND RECLAMATION, LLC,

v.

RAMBLEWOOD HOMEOWNER'S ASSOCIATION, *et al.*

ORDER

The Court having considered the motion for reconsideration filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the motion for reconsideration be, and it is hereby, denied.

/s/ Robert M. Bell
Chief Judge

DATE: December 15, 2006

APPENDIX C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

[Filed June 22, 2006]

No. 0812
September Term, 2005

RAMBLEWOOD HOMEOWNERS ASSOCIATION, *et al.*,

v.

MARYLAND RECLAMATION, LLC

Adkins, Krauser, Rodowsky, Lawrence F., (Retired, Specially Assigned) *JJ.*

Opinion by Adkins, *J.*

This is another case involving split zoning decisions concerning a rubble fill—one of life's "necessary evils" that no one wants in their own backyard. Appellee Maryland Reclamation, LLC, applied for a special exception to convert a nearly depleted sand and gravel mine to a disposal area for construction-related waste. The site is in Upper Marlboro, next to three residential subdivisions with 600 households, which are represented in this litigation by neighborhood associations.[1] It is also just one and a half miles from another rubble fill that was granted a special exception while this application was pending.

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[1] We shall refer to the appellants representing the Ramblewood, Oak Grove, and Robshire Acres neighborhood associations collectively as "the Homeowners."

Aligned with Maryland Reclamation on the side of at least partial approval with conditions are the Maryland-National Capital Park & Planning Commission (M-NCPPC), the Prince George's County Planning Board (the Planning Board), and the county's Chief Zoning Hearing Examiner (the ZHE). In favor of denying the application are appellees, the Homeowners and the Prince George's County District Council (the Council), which concluded that (1) Maryland Reclamation did not prove this rubble fill is necessary, to serve, projected growth, within the meaning of the County zoning code and (2) the rubble fill will have disproportionately adverse impacts on its residential neighbors. On judicial review, the Circuit Court for Prince George's County remanded to the District Council on both "necessity" and "adverse effects" grounds. We shall reverse and remand to the circuit court for entry of an order affirming the District Council.

FACTS AND LEGAL PROCEEDINGS

The Property And Proposed Use

The proposed site has been in use as a surface sand and gravel mine since the 1960s. After portions of it were used as an illegal rubble fill, the property was reclassified to add Class III landfill uses.

The property consists of two R-R zoned parcels totaling 131.5 acres, divided by the County's access road to an adjacent sanitary landfill. The smaller eastern parcel (42.91 acres) borders the Ramblewood residential neighborhood. That parcel and the bisecting access road are near the Oak Grove neighborhood. The larger western parcel (88.59 acres) borders Brown Station Road, on the other side of which is the Robshire Acres subdivision, where some of the homes are located within 100-150 feet. There are three schools located in the vicinity.

According to the District Council,

> [t]he proposed fill area lies immediately east of (and across the street from) the Robshire Acres residential

subdivision and a short distance west of the Ramblewood and Oak Grove subdivisions, whose residents can see and hear operations on the subject property. Other land-intensive uses—mining and fill operations on the subject property, another rubble fill (Ritchie, the S.E. 4408 case) a mile away, an electric power substation immediately to the south, and the adjoining Brown Station Landfill, also to the south—affect the residential properties in Ramblewood, Oak Grove, and Robshire Acres.

Administrative Zoning Review Of The Application

Maryland Reclamation proposes to convert the property from its current use to a rubble fill that can accommodate 300 loads per day, with an associated 600 truck trips per day, for a period of 20 years. In April 1999, the company filed an application for a special exception, which we will refer to as S.E. 4347.

Under Prince George's County Zoning Ordinance section 27-406(k), "[a] sanitary landfill or rubble fills may be permitted as a temporary Special Exception," but only if the District Council finds that ""the proposed use is necessary to serve the projected growth in Prince George's County[.]" Moreover, under section 27-317, another prerequisite for a special exception is proof that "[t]he proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area[.]" We shall refer to these two requirements respectively as the "adverse effects" and "necessity" conditions.

Before S.E. 4347 was considered by the District Council, it traveled through various zoning and planning authorities, on a long but relatively straight path. We summarize the highlights chronologically as follows:

- February 2000. The M-NCPPC's Project Study Team for S.E. 4347 issued its report analyzing "rubble landfills capacity in Prince George's County, Md. (1999-

2014)." This report (and a later update) concluded that there is a need for rubble fill capacity to serve both Prince George's County and other jurisdictions.

- February 25, 2000. After reviewing that study, as well as reports from the Maryland Departments of the Environment, Natural Resources, and Transportation; various Prince George's County agencies (i.e., Fire/ EMS Department, Department of Public Works and Transportation); and several of its own divisions (i.e., Community Planning, Natural Resources, Permit Review, Public Facilities Subdivision, Transportation, and Urban Design Review, the M-NCPPC issued its Technical Staff Report on S.E. 4347. The M-NCPPC recommended approval with conditions.
- July 20, 2000. The Planning Board recommended approval with conditions.
- March 29, 2002. The Chief Zoning Hearing Examiner approved S.E. 4347 for' the larger west mound only, with certain conditions that are not at issue in this appeal.

District Council Denial

After extensive hearings, at which neighbors and other opponents of S.E. 4347 presented evidence, the District Council denied the requested special exception. In its September 24, 2003 findings of fact and conclusions of law, the District Council noted that, at the time the Technical Staff of the M-NCPPC and the Planning Board reviewed S.E. 4347, the District Council had not approved the nearby Ritchie rubble fill (S.E. 4408).

The District Council cited two independent grounds for its decision. First, the District Council found that Maryland Reclamation, "even with staff and Planning Board assistance, did not prove that the proposed rubble fill is 'necessary' to

'serve' the County's 'projected growth,' within the meaning of § 27-406(h) of the Zoning Ordinance" As the District Council interpreted and applied the necessity condition, in order "[t]o make these proofs, a rubble fill applicant must show what the projected County growth in the next 15 years will be, how the proposed facility will 'serve' that projected growth, and how the facility is 'necessary' to serve that growth." "If projected County growth will not be affected by the presence or absence of the proposed facility, then it cannot be said, for purposes of § 27-406(h), that the facility is 'necessary' to serve that growth." According to the District Council, this "lack of necessity" is "the main reason [it] must deny this application[.]"

The District Council also concluded that "an additional reason to deny to the application" is that Maryland Reclamation "did not prove . . . that the proposed rubble fill at this location will not cause adverse effects greater than would be anticipated at other locations in the R-R Zone." These adverse effects in the form of noise, odors, dust, visual effects, traffic safety and congestion are "[t]he chief reasons for neighborhood opposition to the application[.]" The District Council stated:

> The record reflects, first, that the residential communities along Brown Station Road have been visited with more than their fair and reasonable share of mining, and landfill uses, "temporary" in nature, over the last 30 years or more; second, that noise, odors, and visual effects from existing, and past mining, landfill, and other resource recovery and solid waste disposal activities in the neighborhood, as well as from the power lines traversing the neighborhood and the constant truck traffic along Brown Station Road, have been continuing problems for the residents for many years; and third, that neighborhood opposition witnesses showed by. Substantial evidence that the proposed rubble fill operations will

increase for years the adverse noise, odors, visual, and traffic safety effects now present in the neighborhood from existing landfill and other operations. . . .

The District Council . . . concludes, as argued by opposition residents, particularly those in Ramblewood and Robshire Acres communities, that the applicant did not prove, as is required by § 27-317 of the Zoning Ordinance, that the proposed rubble fill at this location will not cause adverse effects greater than would be anticipated at other locations within the R-R Zone. This proposed S.E. 4347 site, is much closer to established residential subdivisions than other R-R sites, including the S.E. 4408 site recently approved by the District Council. Visual, noise, and odor effects from a rubble fill at the subject location will be much greater than would be anticipated at the S.E. 4408 property and other R-R zone locations. (Emphasis added.)

Judicial Review and Remand

Maryland Reclamation petitioned for judicial review of the District Court's decision. After a hearing, the Circuit Court for Prince George's County remanded the matter back to the District Council "for oral argument . . . solely on the issue of necessity under § 27-406(h)[.]" The court concluded that the District Council's interpretation of "necessity" was either incorrect or needed further explanation.

On November 18, 2004, the District Council reaffirmed its denial, supplementing its prior order denying S.E. 4347.

The Examiner concluded that the terms "necessary to serve the projected growth" required only an analysis of "accommodation." But the Examiner's reading of § 27-406(h) essentially nullifies its requirements: a rubble fill applicant will always be able to show that its proposed operation affords some convenience and accommodation to the public, and neither staff nor opposition would be

> able to prove otherwise. . . To satisfy § 27-406(h), an applicant must prove much more than public convenience and accommodation.

The Council emphasized that it

> has determined in this and in two prior rubble fill cases, S.E. 4355 (Brandywine) and S.E. 4408 (Ritchie Reclamation), that . . . . [t]o prove what is called for in § 27-406(h), a rubble fill applicant must address by evidence these three questions:
>
> (1) What will the projected growth in Prince George's County be, during the period of operation of your rubble fill?
>
> (2) How will, your rubble fill operation serve that projected growth?
>
> (3) Why should the District Council conclude that your fill operation will be necessary to serve the projected growth?

Applying this analytical template, the District Council explained why Maryland Reclamation's "proofs are insufficient[.]" Specifically, the Council concluded that Maryland Reclamation failed to show "how the absence of its fill operation will affect growth." The District Council reiterated its "firm belie[f]" that "a rubble fill application should not be approved unless the record shows some likely adverse effects on projected County growth without the proposed operation." Because Maryland Reclamation "did not prove that its operations would have any effects on projected County growth," "the District Council was required to deny the S.E. 4347 application."

The circuit court reviewed the District Council's supplemental order. The court held, "for the second time," that the District Council's interpretation of section 27-406(h) "largely ignored the remand," and 'remained erroneous. Since the

earlier remand, the court noted, "another *nisi prius* judge of this county and three appellate judges (in an unreported opinion in another case) agreed that the clear and plain meaning of the ordinance did not support the District Council's interpretation."

But the circuit court did not reverse the District Council "outright" because it "was persuaded by the argument of counsel for the opposition homeowners" that

> [t]here may be some merit to counsel's suggestion that the record showed the recent approval of another rubble fill approximately' 1½ miles away and an increase of heavy truck traffic different from that which would be generated from any other [site]. Although the District Council made a passing reference to these matters it provided no meaningful discussion of them in its resolution for the court to review. Judicial review of an administrative agency at this level is not appellate review. It is a review only of meaningful findings and conclusions of the administrative body and does not call for reviewing the transcript of the proceedings.

The court remanded to the District Council for reconsideration of the necessity issue, using the correct legal standard. As a result of a motion to alter or amend that order filed by Maryland Reclamation, the court explained that evidentiary proceedings before the District Council would be limited to the necessity issue, but that the Council was not prevented from "making specific findings of fact" on the "adverse effects" issue as well.

Appeal

The District Council and the Homeowners appeal the circuit court's decision, raising three issues that we rephrase as follows:

I. Did the District Council erroneously interpret the "necessity" requirement in section 27-406 of the

county zoning ordinance to mean that the applicant must prove that failure to grant the special exception would adversely impact the county's projected growth?

II. Was the District Council's denial of the special exception arbitrary and capricious because Maryland Reclamation showed "necessity" within the meaning of section 27-406?

III. Did the District Council err in concluding that the rubble fill would cause adverse effects greater than could be anticipated at other locations within the R-R zone?

We find the last issue dispositive, and therefore do not address the first two. We shall hold that there were sufficient findings of fact with respect to disproportionately adverse effects, and that there was substantial evidence to support those findings.

DISCUSSION

Standards For Judicial Review Of Denial Of A Special Exception

In reviewing 'the decision of an administrative agency, "we reevaluate the decision of the agency, not the decision of the lower court." The scope of our review of administrative agency action is narrow and we are "not to substitute [our] judgment for the expertise of those persons who constitute the administrative agency." Accordingly, this Court is tasked with "'determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'"

With regard to questions of fact, we will only disturb the decision of an administrative agency if "a reasoning

> mind reasonably could [not] have reached the factual conclusion the agency reached." Thus, "[a] reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record."

Days Cove Reclamation Co. v. Queen Anne's County, 146 Md. App. 469, 484-85, *cert. denied*, 372 Md. 431 (2002) (citations omitted).

Adverse Effects

> In *Schultz [v. Pritts*, 291 Md. 1 (1981)), the Court of Appeals explained that conditional uses result from the legislative determination that the use is "compatible with the permitted uses in a use district, but that the beneficial purposes [that conditional] uses serve do not outweigh their possible adverse effect." *Id.* at 21. The adverse effect referred to is "at the particular location proposed" and is "above and beyond that ordinarily associated with" the particular conditional use. *Id.* at 22. Thus, the Court held that "the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone."
>
> *Id.* at 22-23. The conditional use provisions of a county zoning code must be read with the holding of *Schultz* engrafted upon them. *See Mossburg v. Montgomery, County*, 107 Md. App. 1, 21 (1995), *cert. denied*, 341 Md. 649 (1996).

Days Cove Reclamation Co., 146 Md. App. at 474-75.

Although the impact of a proposed rubble fill on a unique characteristic of neighboring property is relevant,

> the *Schultz* requirement is not satisfied simply by identifying some unique characteristic of the neighborhood. In order for a unique characteristic of the neighborhood to support the denial of a conditional use it is necessary that the ordinary adverse effects of the conditional use be greater at the location in question, because of the unique characteristics of that location's neighborhood, than would be the case if the use were located elsewhere in the zone.

Id. at 487 (emphasis added).

Among the "adverse effects" that rubble fills may have on neighboring properties are visual, traffic, and property devaluation impacts that inevitably accompany many "LULUs" (*i.e.*, locally undesirable land uses). *See id.* at 485-86. When there is substantial evidence that these adverse effects will be harsher, in kind or degree, than they would be if the same rubble fill were to be located elsewhere within the same zone, these adverse effects may justify denial of a special exception for a rubble fill. *See id.*

This burden of proof can be met with evidence that the proposed rubble fill site will impose inherently adverse effects on neighboring residences, with greater intensity, frequency, and duration, because there are already other similar uses near the proposed site. Four cases illustrate the boundaries of the "cumulative effects" rationale for denying a special exception to operate a rubble fill.

In *Moseman v. County Council of Prince George's County*, 99 Md. App. 258, 266, *cert. denied*, 335 Md. 229 (1994), this Court affirmed the denial of an application for a special exception to operate a rubble fill. We held that

> what makes this site unique is the very fact that there is already an existing rubble fill across the street. The

> District Council recognized the unique problem the cumulative impact of two adjacent rubble fills would have on a single community by concluding that "given the existence of the adjoining rubble fill currently in operation, granting the proposed rubble fill would adversely impact the surrounding properties in a manner unique and different from the adverse impact which would otherwise result if a rubble fill were located elsewhere within the O-S Zone."

Id. (emphasis added).

Similarly, in *Brandywine Enters., Inc. v. County Council of Prince George's County*, 117 Md. App. 525, 537, *cert. denied*, 347 Md. 253 (1997), we also affirmed the denial of a special exception to extend the operation of a rubble fill, on the ground that "there was substantial evidence upon which the District Council could find that there would be a cumulative adverse impact from the proposed fill and from an adjacent closed fill." "[T]he location of the existing and proposed rubble fills is such that, when the rubble fills are all completed and closed, four single family residences will be surrounded on three sides by 100 foot mountains of rubble." *Id.* Road access to these residences was via a lane that was already "severely taxed by the operation of the existing fill[.]" *Id.* at 538. "Even assuming that the rubble fills will not operate simultaneously, the District Council could properly have found that the proposed fill and existing fill will have a cumulative adverse impact upon the nearby residents." *Id.* In addition to visual effects that the opponent's expert characterized as "industrial landscap[ing]," this Court recognized that

> the record supports a finding of temporally cumulative adverse impact.
>
> The Zoning Ordinance provides that a rubble fill may be permitted as a temporary special exception. § 27-

> 406(a). Yet, if the existing fill is completed as scheduled, it will have operated a total of seventeen years, and appellant's proposed fill would require an additional five years of operation. In addition to the obvious (*e.g.*, twenty-two years versus seventeen years of noise, dust, traffic and odors), two examples of such temporally cumulative impact are as follows. There was testimony that the tree canopy over Cross Road Trail, which contributes to Cross Road Trail's classification as a scenic road, has been damaged by heavy truck traffic. It is reasonable to conclude that five additional years of truck traffic would further damage the tree canopy.

Id. at 539 (bold added).

More recently, however, we held in *Day's Cove Reclamation Co. v. Queen Anne's County*, 146 Md. App. at 506, that the evidence was not sufficient to defeat a proposed rubble fill located near a closed landfill and a residential solid waste convenience center. We distinguished *Moseman* and *Brandywine* on the ground that they "involved two landfills." *Id.* at 505. In *Moseman*, we pointed out, "[i]t was 'the existence of the adjoining rubble fill currently in operation' which created the unique adverse impact[.]" *Id.* In *Brandywine*, we emphasized, it was, the "cumulative adverse impact" of having "an active landfill operation" in continuous operation near the neighboring residential properties "for twenty-two years[.]" *Id.* We contrasted such long term and multiple landfill scenarios with the "operational life of the landfill" proposed by Day's Cove, which was scheduled to be the only landfill open in' that area for a period "estimated at five to ten years." *Id.*

Another case finding insufficient "cumulative adverse effects" in the solid waste disposal context is *Mossburg v. Montgomery County*, 107 Md. App. 1 (1995), *cert. denied sub nom. Twin Lakes Citizens v. Mossburg*, 341 Md. 649 (1996). There, we reversed the denial of a special exception to

operate a solid waste transfer station in an industrial zone, because there was insufficient evidence that the proposed site, in combination with a closed landfill and incinerator, had a uniquely cumulative adverse effect on the neighborhood. *See id.*

In this appeal, the Homeowners and the District Council argue that "the facts and legal conclusions, of the District Council related to adverse impacts support a denial of the present application." They contend that there is "substantial evidence in the administrative record" to establish that the proposed rubble fill will have uniquely adverse effects on neighboring residents, due to the cumulative effects of adding this rubble fill to a neighborhood already burdened by the only sanitary landfill in the county, another rubble fill less than two miles away, and an electric substation. They contend that "[t]hese effects, especially noise and dust and odors and dump truck traffic, were shown to be substantial and serious, and would support . . . upholding the Council's denial order even if Maryland Reclamation had proved necessity by clear and convincing evidence." We agree.

As a threshold matter, we reject the circuit court's conclusion that the District Council failed to make meaningful findings of fact or conclusions of law concerning adverse effects. The District Council clearly stated that the Ramblewood and Robshire Acres communities would suffer a harsher impact than other communities near alternative R-R sites for the rubble fill. In support of its conclusion that S.E. 4247 fails the "adverse effects" requirement in Prince George's County Zoning Ordinance section 27-406, the District Council explained that "[t]he record reflects" that these residential communities are the only ones within the R-R zone that will suffer the inherent burdens of living within the adverse impact zone of, not one, but two rubble fills, not to mention a sanitary landfill and an electric substation. Furthermore, the Council pointed out that the residential

communities adjacent to the Maryland Reclamation site are the only ones for whom the supposedly "temporary" burden of living near solid waste disposal sites would be extended "for years" beyond the "30 years or more" that they already have "been visited with more than their fair and reasonable share of mining and landfill uses." In addition, the Council found that

> [t]his proposed S.E. 4247 site is much closer to established residential subdivisions than other R-R sites, including the S.E. 4408 site [*i.e.*, the Ritchie Rubble Fill] recently approved by the District Council. Visual, noise, and odor effects from a rubble fill at the subject location will be much greater than anticipated at the S.E. 4408 property and other R-R zone locations.

Taken together, these are not mere "passing references," as the circuit court characterized them. The District Council explained with specificity that it found harsher adverse impacts on these Homeowners, based on the cumulative effects of (a) increased burdens of "adverse noise, odors, visual, and traffic safety effects" caused by the nearby Ritchie rubble fill; (b) extension of solid waste disposal fill operations, and these same associated burdens, at the Maryland Reclamation site for another nine years; and (c) proximity to adjacent residential neighborhoods, which will be subjected to greater "visual, noise, and odor effects" than are neighbors of even the nearby Ritchie rubble fill. These detailed findings permit meaningful judicial review, in that they identify the factual basis for the Council's adverse effects conclusion.

Moreover, we find substantial evidence in the administrative record to support these findings. Evidence is substantial for purposes of supporting a county board's factual finding of adverse effects if it could have persuaded a reasonable person to reach the same conclusion, *i.e.*, if the factual question is "fairly debatable." *See Bd. of County Comm'rs for. Cecil County v. Holbrook*, 314 Md. 210, 218 (1988).

Maryland Reclamation itself actually provides some of best evidence that the proposed rubble fill will create uniquely adverse effects for its neighbors in Robshire Acres, Ramblewood, and Oak Grove. Admitting these effects, Maryland Reclamation justifies them on a "containment" theory. Both Maryland Reclamation's application and the testimony of its land use expert advocate approval of the proposed rubble fill as a means of preventing other communities from having to suffer them.

Indeed, the company explained in its application that

> [t]he proposed site is located in a unique area of the county where other similar type uses, such as a sanitary landfill, auto salvage yard and an electric substation and overhead transmission lines abound. Locating a rubble fill at this location, in which the proposed use will be partially encircled by the county's landfill, directly diminishes the potential for negative impact on properties in other areas of the county. (Emphasis added.)

At the hearing, Maryland Reclamation established through its environmental expert that the Brown Station sanitary landfill adjacent to the proposed rubble fill site has been in use since the 1960's, and that, throughout that time, area residents have complained of "nasty things" associated with that landfill, including odors, dust, noise, birds, and truck traffic. If the rubble fill is approved, the expert admitted, "there will be some" additional "cumulative negative impacts" "that will be visited on the residents that live within that neighborhood[.]" In his opinion, however, locating a new rubble fill in the same place would serve the greater good by prolonging and slightly increasing existing burdens on the Homeowners, so that other communities who currently do not suffer such adverse effects will not have to do so. In his words, the type of adverse effects associated with the proposed rubble fill are "already there big time" in the adjacent

subdivisions, so that adding more of them will not "really change anything in the neighborhood."

In addition to this evidence from Maryland Reclamation, the administrative record includes other evidence supporting the District Council's finding of uniquely adverse effects. For example, a report prepared by the MNCPPC dated February 25, 2000 contains evidence that Maryland Reclamation's proposed rubble fill will do greater harm to the "viewshed" of the Homeowners than it would if located elsewhere. The planning professionals acknowledged that this fill would be much closer to residential neighbors than rubble fills at other sites (such as the Ritchie Rubble Fill), because there is so little opportunity to "mitigate" through distance and landscaping:

> An issue that has been increasingly evident in the last several years is the impact a project may have on the viewshed of adjacent properties and the neighborhood in general. This has been an issue for monopoles, industrial sites and even a proposed rubble fill in a much less densely populated portion of southern Prince George's County. In order to evaluate the potential impacts that this application will have on the viewshed, the applicant arranged for a balloon to be raised to the ultimate elevation of the larger mound [i.e., the west mound]. On February 10, 2000 the applicant's representative and staff drove through several of the nearby neighborhoods to determine if the proposed rubble fill would be visible from the neighborhoods or roads in the area. Based on the information gathered on that date, it was determined that most of the residences in Robshire Acres and some residences on several streets in the Oak Grove subdivision would have a direct line of sight of the rubble fill.
>
> The amount of the ultimate rubble fill that will be visible from the various areas will range from an outline as viewed through the trees to a clear view of as much as

> 120+ feet of the rubble fill from some areas of Robshire Acres. . . . In each situation where there was a direct unobstructed view of the proposed rubble fill there was little or no potential for the applicant to provide mitigation. This is generally due to the [close] distance of the viewing locations from the site and the angle of the line of sight. The only potential for reducing the viewshed impacts would be to lower the height of the proposed mound or the planting of additional vegetation near the viewing location. This could require extensive plantings on many properties[.] (Emphasis added.)

The MNCPPC recommended approval of the rubble fill on the condition that additional, specified landscaping be planted along the boundary lines of the property. As the planners acknowledged, however, the top of the 20 foot-high berm surrounding the new rubble fill still would be "located within 200 feet" of 12 homes in the Robshire Acres subdivision, making the distance from these homes to the fill site itself only 300 feet—the distance from goal line to goal line on a football field. The District Council was entitled to conclude on the basis of this report that, notwithstanding any landscaping planted by Maryland Reclamation, the proximity and sight lines would still result in adverse visual impacts above and beyond those that could be expected if the site were located elsewhere within the R-R zone.

Similarly, there was also evidence from which the District Council could reasonably conclude that the rubble fill will present a cumulative burden for the Homeowners, because it will undoubtedly add to the noise, dust, odor, and traffic that the Homeowners , already suffer.

- According to the MNCPPC report, the new rubble fill will result in up to an additional "635 vehicles per day," for a "total of 1,270" trips to and from the site.

- A number of current residents testified about "the constant noise" and "beeping" from trucks as they arrive and back up, as well as the "clatter and clang of the metallic lift gates" as loads are dumped.
- Many residents told the District Council that the noise, along with the dust and odors associated with the continuous dumping, grading, and compacting at the sanitary landfill, and the heavy traffic along the route, already cause them to keep their windows closed and their children inside.
- Several residents and their physicians attributed respiratory and other illnesses to the dust and other adverse effects.
- These adverse effects would increase as a result of the greater number of truck trips and the longer period of fill operation.

We agree with the Homeowners and the District Council that, on this administrative record, the adverse impact question was fairly debatable. Even the evidence and arguments offered by Maryland Reclamation supported the District Council's conclusion that adverse effects from the proposed rubble fill would be greater, in kind, degree, and/or duration, than those same adverse effects would be if the rubble fill were to be located elsewhere in the R-R zone. As in *Schultz*, *Moseman*, and *Brandywine*, there is substantial evidence that the traffic, noise, dust, odor, and unsightliness associated with the proposed waste operation will be greater for the residents of Robshire Acres, Oak Grove, and Ramblewood, because these citizens currently live with similar burdens created by the Brown Station landfill, the Ritchie Rubble Fill, and the electric substation, and have been doing so for decades. Both the confluent nature and the chronological duration of these adverse effects justify the District Council's decision not to extend them.

Conclusion

There was sufficient legal and evidentiary grounds for denying S.E. 4347. The' District Council's finding of cumulative adverse effects is therefore neither arbitrary, capricious, nor erroneous. The circuit court erred in failing to affirm the Council's denial of S.E. 4347 for that reason. Consequently, we shall reverse the judgment, without addressing whether there also was error with respect to the "necessity" requirement of section 27-406.

JUDGMENT REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY FOR ENTRY OF AN ORDER AFFIRMING THE DISTRICT COUNCIL'S DENIAL OF S.E. 4247. COSTS TO BE PAID BY ½ BY MARYLAND RECLAMATION, ½ BY PRINCE GEORGE'S COUNTY.

APPENDIX D

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

[Filed May 4, 2005]

CAL 03-22303

MARYLAND RECLAMATION, LLC
Petitioner,

vs.

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND,
Respondent.

OPINION AND ORDER OF COURT

This case came on for judicial review for the second time on April 29, 2005. In the first judicial review, the court on July 7, 2004 remanded the case to the District Council for it to explain its rationale for using what the court deemed to be an unwarranted interpretation of § 27-406(h) of the Prince George's County Zoning Ordinance.

That section provides that "(W)hen approving a Special Exception for a rubble fill or Class III fill, the District Council shall find that the proposed use is necessary to serve the projected growth in Prince George's County." The District Council denied the Special Exception request and said that its "main reason" for doing so was "that the applicant did not prove the proposed use is necessary to serve the County's projected growth over the next 15 year." The District Council interpreted the term "necessary" in § 27-406(h) to mean that the applicant had to prove that its rubble fill was required. Neither the Technical Staff of the Planning Commission, the Planning Commission or the County Zoning Examiner inter-

preted the ordinance that way. The ordinance requires the technical staff to include an inventory of all approved and pending rubble fills (§ 27-406(e)) and an need analysis based on growth projections over a 15 year period (§ 27-406(g)).

This court held that the ordinance does not require an applicant to demonstrate that not approving its application will in some way adversely affect the county's projected growth. The ordinance provides that the District Council, not the applicant, make this finding. In other words, the ordinance puts the applicant on notice only to provide evidence that its proposed use will alleviate some need of rubble fill deficit projected over a 15 year period.

The planners and the zoning examiner agreed that there was a county need for rubble fill space under Section 27-406(h) of the ordinance and recommended approval of the application. The subject property already had a Class III fill permit, had been used in the past as a rubble and was located between two existing rubble fills. But just because the planners and zoning examiner think so that is not to say that a proposed rubble fill is *per se* necessary to serve the projected needs of the county. That decision is left solely to the District Council.

The burden of proof on the applicant between providing evidence of rubble fill deficit and projected county growth on the one hand and providing evidence that its rubble fill is required for the county's growth on the other hand is one of degree. How an applicant can prove that without its specific fill the county's growth will be adversely affected is beyond the court's ken. It would appear to be an insurmountable burden. Counsel for the District Council suggests otherwise because the District Council has approved a rubble fill utilizing the same standard. However this argument simply begs the question. Moreover, even if the District Council should amend its ordinance to require such evidence in the future

there was never any notice to the applicant that it had to do so in this case.

Finding that its interpretation was an error of law and that this was the "main reason" for its denial, this court remanded the case to the District Council to take a second look at its interpretation.

The District Council largely ignored the remand, repeated its own interpretation of the zoning ordinance and filed a Supplemental Resolution that insisted that an applicant for a special exception landfill must affirmatively show "how the absence of its fill operation will affect growth" in Prince George's County.

This court has concluded for the second time that § 27-406(h) of the ordinance does not require that showing. In the meantime, another *nisi prius* judge of this county and three appellate judges (in an unreported opinion in another case) agreed that the clear and plain meaning of the ordinance did not support the District Council's interpretation. The District Council's intransigence reminds this court of Lewis Carroll's Humpty Dumpty who said "[W]hen I use a word it means just what I choose it to mean, neither more nor less."

In addition to finding an error of law this court also finds the action of the District Council arbitrary and capricious. Having ignored one remand there would seem to be little hope that it will take seriously the second. In fact, undaunted by any interpretations not to its liking, the District Council has proposed an amendment to section 27-406(h) of the Zoning Ordinance that would memorialize this interpretation. The court has given some thought to reversing the District Council outright as suggested by the applicant but is constrained not to do so. The court was persuaded by the argument of counsel for the opposition homeowners. At oral argument they conceded the District Council's error of law and suggested another remand. There may be some merit to counsel's contention that

the record showed the recent approval of another rubble fill approximately 1½ miles away and an increase of heavy truck traffic different from that which would be generated from any other side. Although the District Council made a passing reference to these matters it provided no meaningful discussion of them in its resolution for the court to review. Judicial review of an administrative agency at this level is not appellate review. It is a review only of meaningful findings and conclusions of the administrative body and does not call for reviewing the transcript of the proceedings.

Accordingly, this case is remanded once again for further proceedings before the District Council to consider whether the applicant's proposed rubble fill will alleviate some of the County's projected need using the standard set forth in the ordinance and advocated by counsel for the homeowners; namely whether the proposed rubble fill is necessary to serve county growth in light of other rubble fill applications approved or pending. Evidence shall be permitted on this issue alone and may also include evidence from the applicant, to the extent that it is able or chooses to do so, showing how county growth would fare without its landfill—a condition not yet contemplated by the current ordinance but apparently very much alive in the legislative minds of the District Council.

/s/ James J. Lombardi
JAMES J. LOMBARDI, Judge

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Date: 5-3-05

By: /s/ J. Hahn
J. HAHN

APPENDIX E

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

CAL 03-22303

MARYLAND RECLAMATION, LLC,
Plaintiff,

v.

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY,
MARYLAND, SITTING AS THE DISTRICT COUNCIL,
Defendant.

REMAND ORDER

The Court having heard oral argument from the parties, and requiring additional explanation from the District Council of the meaning and application in this case of the "necessary to serve the projected growth" requirement in § 27-406(h) of the Zoning Ordinance, it is, this 21st of July, 2004, by the Circuit Court for Prince George's County, Maryland:

ORDERED, that this case is hereby REMANDED, without affirmance or reversal, to the County Council of Prince George's County; Maryland, sitting as the District Council; and it is

FURTHER ORDERED, that the District Council set this case for oral argument, with notice to all parties now before the Court, and hear argument from the parties, with no submissions of additional evidence, solely on the issue of necessity under § 27-406(h), and no other issue; and it is

FURTHER ORDERED, that the District Council adopt a new order on the necessity issue, explaining the meaning and

application in this case of the "necessary to serve the projected growth" requirement in § 27-406(h), and file the order with the Court, as soon as practicable after the oral argument; and it is

FURTHER ORDERED, that after the Council files the order on the necessity issue, the parties shall have 30 days from the date of that filing to submit to the Court additional written argument on the issue, and the Court will thereafter advise the parties of the course of future proceedings.

/s/ James J. Lombardi, Judge
JAMES J. LOMBARDI
Circuit Court for Prince George's County

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/s/ Jean Hahn 7-21-04
JEAN HAHN, Administrative Assistant

APPENDIX F

DR-2 COUNTY COUNCIL OF
PRINCE GEORGE'S COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL

Legislative Session: 1992
Bill No.: CB-85-1992
Chapter No.: 73
Proposed and Presented by: Council Member Wineland
Introduced by: Council Member Wineland
Co-Sponsors:
Date of Introduction: October 20, 1992

ZONING BILL

AN ORDINANCE concerning:

Special Exceptions for Rubble Fills

FOR the purpose of requiring that an analysis of need be included in the approval of a Special Exception for a Rubble Fill.

BY repealing and reenacting with amendments:

Section 27-406

The Zoning Ordinance of Prince George's County, Maryland, being also:

SUBTITLE 27. ZONING.
The Prince George's County Code
(1991 Edition).

SECTION 1. BE IT ENACTED by the County Council of Prince George's County, Maryland, sitting as the District Council for that part of the Maryland-Washington Regional District in Prince George's County, Maryland, that Section 27-406 of the Zoning Ordinance of Prince George's County, Maryland, being also Subtitle 27 of the Prince George's

County Code, be and the same is hereby repealed and re-enacted with the following amendments:

SUBTITLE 27. ZONING.

PART 4. SPECIAL EXCEPTIONS.

DIVISION 3. ADDITIONAL REQUIREMENTS FOR SPECIFIC SPECIAL EXCEPTIONS.

Sec. 27-406. Sanitary landfill; rubble fill.

(a) A sanitary landfill or rubble fill may be permitted as a temporary Special Exception.

(b) The District Council shall determine the period of time for which the Special Exception is valid.

(c) In the R-E Zone, the landfill is only allowed if the neighborhood is substantially undeveloped and the landfill is an extension of an existing sanitary landfill on abutting land for which the approved Special Exception has not expired. This is not an amendment to an approved Special Exception under Subdivision 10 of Division 1, above.

(d) An application for a sanitary landfill or rubble fill that includes a "rock crusher" on the site must show the location of the proposed "rock crusher" on the site plan.

(e) The Technical Staff Report prepared in response to the application shall include a current, Countywide inventory of the locations, dates of approval, and conditions of approval concerning haul routes and estimated loads per day for all approved and pending Special Exceptions for sand and gravel wet-processing, sanitary landfills and rubble fills, and surface mining, as indicated by the record in the case. The inventory shall also include the locations of all nonconforming sand and gravel wet-processing, sanitary landfills and rubble fills, and surface mining operations throughout the County that were certified after September 6, 1974.

(f) In reviewing the application for compliance with the required findings set forth in Sections 27-317(a)(4) and 27-317 (a)(5), the District Council shall consider the inventory, required in Section 27-406(e).

(g) The Technical Staff Report prepared in response to an application for a rubble fill shall include an analysis of need based on the most current available projections of residential and employment growth in Prince George's County over a fifteen-year period. The District Council shall consider this analysis when determining compliance with the finding required in time for which the Special Exception is valid.

(h) When approving a Special Exception for a rubble fill, the District Council shall find that the proposed use is necessary to serve the projected growth in Prince George's County.

SECTION 2. BE IT FURTHER ENACTED that this Ordinance shall take effect on December 31, 1992.

Adopted this 17th day of November, 1992.

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND, SITTING AS THE DISTRICT COUNCIL FOR THAT PART OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT IN PRINCE GEORGE'S COUNTY, MARYLAND

BY:

Richard J. Castaldi
Chairman

ATTEST:

_____

Joyce T. Sweeney.
Acting Clerk of the Council

KEY:

Underscoring indicates language added to existing law.

[Brackets] indicate language deleted from existing law.

Asterisks *** indicate intervening existing Code provisions that remain unchanged.

AGENDA ITEM SUMMARY
PRINCE GEORGE'S COUNTY COUNCIL

Reference No: CB-85-1992
Draft No: 2
Meeting Date: 11/17/92
Requester: WI

Item Title: An Ordinance for the purpose of requiring that an analysis of need be included in the approval of a Special Exception for a rubble fill

Sponsors WI

Date Presented 9/22/92
Committee Referral (1) 9/22/92 P&Z
Committee Action (1) 10/14/92 FAV(A)
Date Introduced 10/20/92
Pub. Hearing Date (1) 11/17/92 1:30 PM
Executive Action __/__/__
Effective Date12/31/92

Council Action (1) 11/17/92 Enacted
Council Votes CA: A_, B_: A_, C_: A_, D_: A_, F_: A_, MC: A_, M_: A_, P_: A_, WI: A_

Pass/Fail P

Remarks

Drafter: Mary Lane, Director
Planning & Zoning Com.

Resource Personnel:

LEGISLATIVE HISTORY

PLANNING AND ZONING COMMITTEE REPORT

DATE: 10/14/92

Committee Vote: Favorable as amended, 5-0 (In favor: Council Members Casula, Del Giudice, Fletcher, Mills and Wineland).

Staff explained that this legislation is intended to ensure that the rubble fills approved in Prince George's County are necessary to serve the needs of this County, and not the needs of the entire region. The sponsor added that since Federal law prohibits the County from restricting the use of privately-owned rubble fills, requiring a needs analysis prior to Special Exception approval will help preserve this resource and protect the citizens of the County.

Gene Lauer, the Director of DER, expressed concern that limiting the number of rubble fills would not prevent out-of-County trucks from using the fill, and the capacity of the fills would simply be depleted sooner. He also requested that the timeframe for analysis be increased from ten years to twenty years. The Committee agreed to fifteen years.

The Municipal Association supports the legislation, and the Legislative Officer found it to be in proper legislative form. The Planning Board supports the legislation, with an amendment to require the applicant, rather than the Technical Staff, to prepare the needs analysis. This amendment was rejected by the Committee.

BACKGROUND INFORMATION/FISCAL IMPACT

(Includes reason for proposal, as well as any unique statutory requirements)

There are certain Special Exception uses, including gas stations and planned retirement communities, for which a finding of need within a particular service area must be made.

This legislation requires a similar finding for the approval of rubble fills. Specifically, an analysis of need based on projected growth in the County must be included in the Technical Staff Report, and the District Council must use this information, to determine whether the proposed use is necessary to serve the needs of Prince George's County.

CODE INDEX TOPICS:

Zoning
Special Exceptions
Additional Requirements for Specific Special Exceptions
Sanitary landfill; rubble fill 27-406

(2)

No. 06-1569

FILED
JUN 2 8 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MARYLAND RECLAMATION, INC.,

Petitioner,

v.

RAMBLEWOOD HOMEOWNERS ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Special Appeals Of Maryland

BRIEF IN OPPOSITION FOR RESPONDENT DISTRICT COUNCIL

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OR CALL COLLECT (402) 342-2831

RESPONSE TO PETITIONER'S "QUESTIONS PRESENTED"

Respondent County Council of Prince George's County, Maryland, sitting as the District Council for the Maryland-Washington Regional District in Prince George's County, respectfully states as follows, in response to the statement of "Questions Presented" by petitioner Maryland Reclamation, Inc.

1. Petitioner, in an effort to transform an ordinary zoning case into a controversy of constitutional dimension, has substantially misstated the issues presented to this Court and the course of state-court proceedings below. Neither question stated in the petition, under the Commerce Clause and the Fourteenth Amendment, was sufficiently raised by petitioner, in the Maryland courts; neither question was considered or passed on, in the Maryland courts; and neither question was factually developed by a record of evidence, in the Maryland courts.

2. If the Court were to grant this petition, it would search the record in vain, for any reference by a Maryland court to the Commerce Clause or the Fourteenth Amendment. The state court decisions,[1] including that of the trial court, Pet.App., at 23a; the Court of Special Appeals, *id.*, at 3a, which rendered the final opinion; and the Court of Appeals of Maryland, *id.*, at 1a, 2a, which denied certiorari and then denied reconsideration, show that no court even discussed the Commerce Clause or the Fourteenth Amendment.

---

[1] Petitioner has included the Maryland court decisions in the appendix to its petition. Respondent Council will cite to items in petitioner's appendix as "Pet.App., at ___."

RESPONSE TO PETITIONER'S "QUESTIONS PRESENTED" – Continued

3. The opinion of the Court of Special Appeals demonstrates clearly that this case was decided on the theory of "cumulative adverse effects," under Maryland zoning law. Pet.App., at 13a-14a, 21a. In affirming the District Council decision denying the Maryland Reclamation special exception application, the lower court relied solely on Maryland zoning decisions. It did not review (and was not presented) questions of federal law.

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BRIEF IN OPPOSITION FOR RESPONDENT DISTRICT COUNCIL

Respondent District Council respectfully requests that this Court deny Maryland Reclamation's petition for writ of certiorari.

SUMMARY OF REASONS TO DENY THE PETITION

The Maryland court's decision is not eligible for review here, even if this Court found an issue of interest in the petition. As to the Commerce Clause, the lower court's decision rests on an adequate, independent state law ground, the cumulative adverse effects theory in Maryland zoning law. As to jurisdiction, no Maryland court considered the Commerce Clause and Fourteenth Amendment issues that petitioner raises here. Finally, the questions petitioners present do not have a factual record to support them.

STATEMENT OF THE CASE

Respondent District Council submits the following, to supplement and correct petitioner's statement of the case:

1. Petitioner suggests that this Court will review the "judgment" of 15 December 2006 of the Court of Appeals of Maryland. Petition, at 1. But the Court of Appeals merely denied, in its discretion, a petition for certiorari, under Md. Cts. & Jud. Proc. Code Ann. § 12-203 (2006 Repl. Vol.). Pet.App., at 1a. This Court's writ would run to the Court of Special Appeals, whose decision, under 28 U.S.C.

§ 1257(a), was the final one on the merits. Pet.App., at 3a. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 & n.1 (1968).

2. Petitioner substantially misstates the record, when it says that it "asked the [trial] court to determine whether or not the requirement of § 27-406(h) of the Prince George's County Zoning Ordinance violated the interstate commerce clause of the United States Constitution." Petition, at 1. Petitioner never made such a request, and neither the trial court nor the Maryland appellate court addressed the Commerce Clause. Pet.App., at 23a-26a, 3a-22a.

3. Petitioner also misstates the record when it suggests that it asked the trial court to determine "whether . . . the District Council . . . violated the petitioner's due process rights." Petition, at 1-2. At best, petitioner did so in passing; neither the trial court nor the Maryland appellate court addressed a due process issue under the Fourteenth Amendment. Pet.App., at 23a-26a, 3a-22a.

4. Respondent County Council, sitting as the District Council, acted here under the Regional District Act, § 8-101, et seq., Art. 28, Md. Code Ann. (2003 Repl. Vol.), not Articles 23A and 23B. Petitioner's citation is erroneous. Petition, at 4.

5. The illegal remand argument in the petition was not presented to any Maryland court. Petition, at 4-5. No court addressed the argument.

In addition, the materials that petitioner cites for its Commerce Clause argument, and the argument itself, were not presented to or reviewed by any Maryland court.

Petition, at 7-9. Nor were the "original jurisdiction" and "de novo" review theories. Petition, at 11-16. The latter arguments, purportedly raising due process issues, are presented in this Court for the first time.

REASONS FOR DENYING THE PETITION

I. THE MARYLAND COURT'S DECISION RESTS ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND.

This is a Maryland zoning case. The issues litigated in administrative proceedings, in the trial court, and in the appellate court were the "adverse effects" of the proposed land use, a rubble fill, and the "necessity" for the rubble fill at this location. Pet.App., at 6a-8a, 9a-10a, 11a. *Not* litigated below, at any level, were the two issues petitioner seeks review of here, Commerce Clause violation and Fourteenth Amendment Due Process Clause compliance.

The decision of the Court of Special Appeals was summarized as follows, in its opinion:

> We agree ... that on this administrative record, the adverse impact question was fairly debatable. Even the evidence and arguments offered by Maryland Reclamation supported the District Council's conclusion that adverse effects from the proposed rubble fill would be greater, in kind, degree, and/or duration, than those same adverse effects would be if the rubble fill were to be located elsewhere in the R-R zone.... [T]here is substantial evidence that the traffic, noise, dust, odor, and unsightliness associated with the proposed waste operation will be greater for the residents ..., because these citizens currently

> live with similar burdens created by the Brown Station landfill, the Ritchie rubble fill, and the electric substation, and have been doing so for decades. Both the confluent nature and the chronological duration of these adverse effects justify the District Council's decision not to extend them.

Pet.App., at 21a (portions omitted). This case was about traffic, noise, dust, odor, and unsightliness: these are "adverse effects" in Maryland zoning law. At no time before the filing of the petition did this case concern the Constitution.

The Maryland appellate court specifically did not rule on the necessity issue under § 27-406(h) of the zoning ordinance, the section that petitioner attacks here, under the Commerce Clause. It did not have to. The court held that even if necessity had been proved, petitioner's evidence on adverse effects was insufficient. Pet.App., at 11a.

In these circumstances, the decision of the Maryland court plainly rests on an adequate and independent state law ground. That is, petitioner had its application denied because of adverse effects, under § 27-317 of the zoning ordinance; the necessity argument under § 27-406(h) was not considered; and the Commerce Clause issue, even if properly raised, would also not have been considered.

As to the Commerce Clause, this Court has no jurisdiction. The Court will not take up a question of federal law "if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

II. NO MARYLAND COURT ADDRESSED THE COMMERCE CLAUSE OR THE FOURTEENTH AMENDMENT.

The decisions on the merits in both the trial court, Pet.App., at 23a, and the appellate court, *id.*, at 3a, and the discretionary denial of review in the Court of Appeals, *id.*, at 1a, 2a, did not mention the Commerce Clause or the Fourteenth Amendment. Moreover, petitioner has overlooked the requirement in Rule 14.1(g)(i) of the Supreme Court Rules that petitioner's statement of the case must indicate "when the federal questions sought to be reviewed were raised . . . and the way in which they were passed on by those courts."

If petitioner fully complied with Rule 14.1(g)(i), it would have to acknowledge that it never briefed or argued either the Commerce Clause or the Fourteenth Amendment; that it specifically introduced no evidence on either issue; and that no Maryland court considered either issue. Petitioner does not satisfy the rule, and cannot demonstrate to the Court "that the federal question was timely and properly raised" or that the Court "has jurisdiction to review the judgment." The federal questions petitioner presents here were simply not litigated below.

Under the Commerce Clause, petitioner claims that § 27-406(h) of the Prince George's County zoning ordinance is unconstitutional. Petition, at 7-11. The Maryland courts did not see petitioner's citations or read its argument.

Under the Fourteenth Amendment, petitioner concocts an elaborate theory that it was denied a "fair hearing." Petition, at 11-16. The argument, based on misinterpretations of the zoning ordinance and substantial misstatements

of what transpired below, was not offered in any form in the Maryland courts. The zoning ordinance does not, for evidentiary purposes, grant "original jurisdiction" to the District Council, in zoning cases; the District Council *never* conducts "de novo" evidentiary hearings, in zoning cases; and petitioner never made those arguments, in proceedings below. If it had, the trial court and the appellate court would have mentioned them.

Petitioner must show that the federal questions were presented to or addressed by the Maryland courts. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Under 28 U.S.C. § 1257(a), the Court has no jurisdiction over the Commerce Clause or Fourteenth Amendment claims. *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 & n.2 (1972) (constitutional issues must be raised "in clean-cut and concrete form," quoting *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947)).

III. THE RECORD HAS INSUFFICIENT EVIDENCE TO CONSIDER THE COMMERCE CLAUSE OR FOURTEENTH AMENDMENT ISSUES.

Finally, if the Court were inclined to grant the writ and call up the state-court record, it would find scant support for either theory petitioner advances.

On the Commerce Clause, the petition already presents to the Court all the evidence the record contains. Petition, at 7-11. Petitioner offered nothing, at any level of state administrative or judicial proceedings.

As to Fourteenth Amendment due process, petitioner did not raise the argument before the District Council or the trial court, and certainly presented no evidence.

Petition, at 11-16. This argument is simply makeweight, to fortify the constitutional standing of the petition.

The record is insufficient for the Court's review. *Cf. Michigan v. Harvey*, 494 U.S. 344, 354 (1990) (no record, where constitutional issue "was never litigated").

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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June 28, 2007

59

(3)

No. 06-1569

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

MARYLAND RECLAMATION, INC.,

Petitioner,

v.

RAMBLEWOOD HOMEOWNER'S ASSOCIATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE CASE

Petitioner, here is Maryland Reclamation, Inc. (Pet. at 1). Maryland Reclamation, Inc. was not a party below and it is not a Maryland Corporation. Maryland Reclamation, LLC is sometimes referred to as the Petitioner in the present Petition (Pet. at 3) and it was the appellee below. Maryland Reclamation LLC, is a limited liability company organized under the laws of the State of Maryland. Respondents and appellants below, are Ramblewood Homeowners Association, Donald Carter, a resident at Ramblewood, and Prince George's County Council, sitting as the District Council. Ramblewood Homeowners Association is a corporation organized under the laws of the State of Maryland.

DISCLOSURE

Pursuant to this Court's Rule 29.6, Ramblewood Homeowners Association states that it has no parent company and that no publicly held company owns more than 10% of Ramblewood's stock.

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Prince George's County Code Sec. 27-127 ..... 15, 18

Prince George's County Code Sec. 27-129 ..... 15, 16, 18

Prince George's County Code Sec. 27-131 ..... *passim*

Prince George's County Code Sec. 27-132 ..... 17, 19

Prince George's County Code Sec. 27-133 ..... 17, 19

Prince George's County Code Sec. 27-135 ..... 18, 19

Prince George's County Code Sec. 27-327 ..... 18, 19, 20

Prince George's County Code Sec. 27-406(g), (h) 3, 4, 21, 22

OPINIONS BELOW

In addition to the opinions listed by Petitioner (Pet. 2) the District Council of Prince George's County signed a final order on September 22, 2003, which was entered on September 25, 2003 (September 22, 2003 order), that denied Petitioner's Application for a Rubble Fill. This order contained the findings of Fact and Conclusions of Law relied on by the District Council. A copy of this order appears at appendix A to this Brief. On November 18, 2004 the District Council filed a Supplemental Order of Denial incorporating the September 22, 2003 order and addressing the necessity issue after remand from the Circuit Court and a copy of this Supplemental Order appears at appendix B to this Brief.

JURISDICTION

Petitioner seeks to invoke this court's jurisdiction under 28 U.S.C. § 1257(a) to review Maryland's Court of Appeals denial of Petitioner's Motion For Reconsideration of Denial Of Petition For Writ of Certiorari (Motion For Reconsideration). However, in the circumstances of this case 28 U.S.C. § 1257(a) cannot be used to invoke jurisdiction.

STATEMENT OF THE CASE

1. The Facts

This case concerns Petitioner's application for a special exception for a rubble fill that was filed in Prince George's County Maryland (county). The proposed site is

divided into two parcels which together total 131.5 acres and these sites are separated by the county access road to the sanitary landfill. Pet. App. 4a. The largest of the two parcels borders on Brown Station Road and it is 88.59 acres. Id. The eastern parcel is the smaller of the two at 42.91 acres and it borders the Ramblewood and Oak Grove Communities. Id. Both parcels are extraordinarily close to the neighborhood homes. Pet. App. 4a-5a. On the western side, the proposed site is within 100 to 150 feet of the homes in Robshire Acres. Id. There are over 600 families in the Robshire, Ramblewood and Oak Grove communities. Pet. App. 3a. The 600 families have been suffering for decades from the direct impact of a nearby sanitary landfill; the Ritchie Reclamation Rubble Fill (Ritchie), which is less than one and a half miles from the proposed rubble fill; and an electric substation. Pet. App. 3a, 16a-19a. One reason for the District Council's denial of Petitioner's application and the sole reason for Maryland's Court of Special Appeals affirmance of that denial was the substantial evidence in the record of these cumulative adverse impacts. Pet. App. 11a.

2. Proceedings Before The Administrative Agency

Hearings on Petitioner's Application were initially held by the Office of the Zoning Hearing Examiner. After thirteen (13) evidentiary hearings, the Zoning Hearing Examiner (ZHE), on March 29, 2002, denied Petitioner's application for the smaller parcel and granted it for the larger parcel. Pet. App. 6a. Except in the case of remand from the District Council back to ZHE, no new evidence not already in the record is allowed to be introduced once the case is appealed to the District Council pursuant to section 27-131(f) of the county code. Both Petitioner and

Respondents, Ramblewood Homeowners Association and Donald Carter (Respondent),[1] on April 29, 2002, appealed to the District Council by filing written exceptions specifying the portions of the record below they relied on for claiming error pursuant to section 27-131(a) and (b) of the county code and requesting oral argument. The District Council remanded the case for further hearings on the necessity issue in June of 2002. Additional evidence on that issue only was taken and on May 3, 2003 ZHE issued its final decision. Both parties, in May of 2003, again filed written exceptions, and oral argument on all issues in the case took place on September 22, 2003. The District Council signed an Order dated September 22, 2003 that denied Appellee's application on both cumulative adverse impact grounds and a failure to prove necessity. App. 1a; Pet. App. 6a.

3. Proceedings Before The Circuit Court For Prince George's County

Petitioner, appealed the Council's denial of the special exception to the Circuit Court of Prince George's County in case number CAL-03-22303. The Circuit Court appeal was heard in two separate judicial review hearings. The first hearing was held on July 16, 2004 and resulted in a subsequent order of remand for the purpose of having the county council explain the meaning and application of the "necessary to serve the projected growth" requirement in 27-406(h) of the county zoning ordinance. Pet. App. 28a.

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[1] The term Respondent in this Brief refers to both Ramblewood Homeowners Association and Donald Carter. The Prince George's County Council sitting as the District Council will file a separate opposition brief to the Petition.

The Council, on November 8, 2004, issued a supplemental order readopting its earlier order. App. 12a.

A second hearing was held in the Circuit Court on April 29, 2005 and on May 3, 2005, Judge Lombardi issued another remand order finding that the Council's interpretation of 27-406(h) was an error of law and once again remanded the case to the District Council on both necessity and adverse effects grounds. Pet. App. 4a.

4. Proceedings Before Maryland's Court Of Special Appeals

Respondents filed Appeals to Maryland's Court of Special Appeals. Pet. App. 3a. The constitutional grounds claimed here were not raised by Petitioner before the Court of Special Appeals. Id. Maryland's intermediate appellate court in an unreported opinion affirmed Prince George's County Council's decision to deny the application solely on the basis of state law. Pet. App. 11a.

5. Proceedings Before Maryland's Court Of Appeals

Petitioner filed for a writ of certiorari in the Court of Appeals but it did not raise either of the constitutional issues that it asks this Court to review here. The Maryland Court exercised its discretion and denied the petition on October 18, 2006. Pet. App. 1a. Once its petition for certiorari was denied Petitioner filed a Motion To Reconsider in which Petitioner for the first time raised its due process argument based on the District Council's alleged failure to provide oral argument. However, again Petitioner failed to raise its commerce clause argument. The Motion was denied. Pet. App. 2a.

REASONS FOR DENYING THE PETITION

I. THIS COURT DOES NOT HAVE JURISDICTION PURSUANT TO 28 U.S.C. § 1257(a)

A. The Highest State Court To Render A Judgment In The Present Case Was Maryland's Intermediate Appellate Court Not Maryland's Court Of Appeals.

Petitioner, requests that a writ of certiorari issue for the review of the Maryland Court of Appeals Order denying Petitioner's Motion For Reconsideration issued on December 15, 2006. Pet. at 1, 2, 7 and Pet. App. 2a. Such a writ cannot issue since the only reviewable decision below pursuant to 28 U.S.C. § 1257 was the decision of Maryland's intermediate appellate court.

Under Maryland law writs of certiorari filed in Maryland's highest court are granted or denied in the exercise of the sound discretion of Maryland's Court of Appeals. *Waltson v. Sun Cab Company, Inc.*, 267 Md. 559, 564-566, 298 A.2d 391, 395 (1973). Appeals of right in cases such as the present one are to the Court of Special Appeals of Maryland. Id.

As this Court stated in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968).

> "The Texas Supreme Court denied discretionary review and therefore the appeal is from the judgment of the Court of Civil Appeals 28 U.S.C. § 1257(a)."

Similarly, this Court held in *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923) that:

> "A preliminary objection is urged that the present writ of certiorari was addressed to the Court

> of Appeal and not to the Supreme Court. But under the Constitution of the State the jurisdiction of the Supreme Court is discretionary. . . . when the jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had. . . ."

Id. More recently, in *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 500 (2001) this Court granted certiorari to review the judgment of Maryland's intermediate appellate court as the final judgment rendered in a case in which Maryland's highest court declined to exercise discretionary review. Id. Thus, in the present case, when Maryland's highest court exercised its discretion and denied Petitioner's petition for certiorari, the judgment of Maryland's intermediate appellate court became the final judgment rendered by the highest court in Maryland and it is only this judgment that is reviewable by this Court pursuant to 28 U.S.C. § 1257(a).

B. Adequate State Grounds For the Decision Below

Maryland's Court of Special Appeals affirmed Prince George's County Council's decision to deny the application solely on the basis of state law:

> "We shall hold that there were sufficient findings of fact with respect to disproportionately adverse effects, and that there were substantial evidence to support those findings."

Pet. App. 11a.

The Court of Special Appeals explained that the burden of proof on this issue can be met under state law through the concept of cumulative adverse impacts.

> "This burden of proof can be met with evidence that the proposed rubble fill site will impose inherently adverse effects on neighboring residences, with greater intensity, frequency, and duration, because there are already other similar uses near the proposed site. Four cases illustrate the boundaries of the "cumulative effects" rationale for denying a special exception to operate a rubble fill."

Pet. App. 13a.

The Court further explained that two currently operating landfills within close proximity of one another subjects the surrounding residential community to cumulative adverse impacts as does the closing of one landfill operation and the immediate opening of another in the same location so that the neighboring residential properties suffer the effects of a landfill operation for a total of 22 years. Pet. App. 15a. The Court of Special Appeals then found that there were sufficient findings of fact with respect to disproportionate adverse impacts and there was substantial evidence in the record to support those findings. Pet. App. 16a-17a.

In making its ruling the Court of Special Appeals also applied state law standards for the review of an administrative agency decision and stated:

> "In reviewing 'the decision of an administrative agency, "we reevaluate the decision of the agency, not the decision of the lower court." The scope of our review of administrative agency action is narrow and we are "not to substitute (our) judgment for the expertise of those persons who constitute the administrative agency." Accordingly, this Court is tasked with' "determining if there is substantial evidence in the record as a whole to

> support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. . . ." *Days Cove Reclamation Co. v. Queen Anne's County*, 146 Md. App. 469, 484-85, cert. denied, 372 Md. 431 (2002) (citations omitted)."

Pet. App. 11a.

As this Court said in *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945):

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. . . ." (Citations omitted).

Id.

Thus there is no doubt that the Court of Special Appeals decision rests only on state grounds and that this Court does not have jurisdiction under 28 U.S.C. § 1257 to hear this case.

C. Petitioner Has Failed To Meet Its Burden Of Showing That The Federal Questions Were Either Addressed By Or Properly Considered By The State Court That Rendered The Decision To Be Reviewed

This Court has repeatedly stated that a petitioner must meet the burden of showing that the federal questions were addressed by or properly presented to the state Court that rendered the reviewable decision. *Adams v. Robertson*, 520 U.S. 83, 86 (1997); *Webb v. Webb*, 451 U.S. 493, 495 (1981). Where the state court does not address the federal question there is a presumption that the constitutional issues were not properly raised:

> "This Court has frequently stated that when the highest state court has failed to pass on a federal questions, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." (Citation omitted).

Id. *Webb v. Webb*, 451 U.S. at 495.

Moreover, to meet its jurisdictional burden and rebut the presumption, Petitioner must at least comply with the prerequisites of Supreme Court Rule 14.1(g)(i). As the Court said of former Rule 21.1(h) the predecessor of Rule 14.1(g)(i):

> "Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257. As applied to the circumstances of this case, that statute requires that in the state courts petitioner have 'specially set up or claimed under the Constitution . . . of . . . the United States' that right which she now seeks to

> have this Court enforce. 28 U.S.C. § 1257(3). Similarly our Rule 21.1(h) *requires* the petitioner to 'specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court.'" (Emphasis added).

Id. *Webb v. Webb*, 451 U.S. at 495.

The petition, in the present case, simply does not specify the stage of the proceedings when the federal questions sought to be reviewed were raised in the first instance and in the appellate courts. The petition does not state the method or manner that the federal questions were raised before the Prince George's County District Council or any of the Appellate Courts. The petition does not state the way in which the federal questions were passed on by the District Council or the Maryland Courts and the petition does not contain any pertinent quotations of specific portions of the record where the federal questions appear so as to show that this Court has jurisdiction to review the judgment on a writ of certiorari.

Thus Petitioner has failed to meet its burden of affirmatively establishing that it properly raised the federal questions below and the result of such a failure to meet its burden should be a denial of its Petition. *Adams v. Robertson*, 520 U.S. 83, 86 (1997); *Webb v. Webb*, 451 U.S. 493, 495 (1981).

D. Petitioner Failed To Follow Maryland Procedures For Securing Review In State Court Of Its Alleged Federal Questions.

Here, in its zeal to obtain review Petitioner neglects to tell this court that it failed to address in its petition for writ of certiorari to Maryland's highest court either of the alleged constitutional issues that it now seeks this Court to review. Moreover, Petitioner fails to tell this Court that it did not argue either constitutional issue in its Brief To Maryland's Court of Special Appeals. In fact, Petitioner in its Motion For Reconsideration to Maryland's highest court for the first time raised its denial of oral argument as a due process issue, but even then petitioner failed to raise the commerce clause issue.

The scope of Appellate review in Maryland is governed by Rule 8-131. Subsection (b) of 8-131 states:

> "(1) Prior Appellate Decision. – Unless otherwise provided by the order granting the writ of certiorari, in reviewing a decision rendered by the Court of Special Appeals or by a circuit court acting in an appellate capacity, the Court of Appeals ordinarily will consider only an issue that has been raised in the petition for certiorari or any cross-petition and that has been preserved for review by the Court of Appeals."

As a general rule Maryland's highest court has held that where a Petitioner does not raise an issue in its request for writ of certiorari, it lacks jurisdiction to review the matter. *Allied Investment Corp. v. Jasen*, 354 Md. 547, 568, 731 A.2d 957, 968 (1999); *Lerman v. Heeman*, 347 Md. 439, 450-451, 701 A.2d 426, 432 (1997).

Maryland's decision in *Solberg v. Majerle*, 388 Md. 281, 292-293, 879 A.2d 1015, 1021-1022 (2005) is especially instructive on Maryland appellate procedure for the present case. In that case the Respondent, without raising the issue in a petition for certiorari or cross-petition for certiorari, asked Maryland's highest court to address the issue of whether the use of a de novo standard of review on appeal, where the statue only provided for a review on the record, divested the lower court of subject matter jurisdiction. Id. Maryland's highest court determined that it did not, pointing out the difference between cases where a court lacks the power to hear a class of cases, i.e. subject matter jurisdiction, and inappropriate exercises of jurisdiction due to a court's violation of statutory restrictions on a court's authority such as applying de novo standards of appeal when a statute requires appeals to be heard on the record. Id. *Solberg*, 388 Md. at 294, 879 A.2d at 1022. Issues involving an "inappropriate exercise of jurisdiction" must be raised in a petition for certiorari and Maryland's highest Court said:

> (1) Although neither Majerle nor the landlord filed a cross-petition for certiorari, Majerle argues in its brief that the Circuit Court lacked jurisdiction to hear the tenants' appeal de novo. Ordinarily, we would not address an issue not raised in a petition for certiorari, but a jurisdictional defect may be noticed on our own initiative. The simple answer to the argument is that there was no lack of jurisdiction in the Circuit Court, and, in the absence of the issue being raised in a petition for certiorari, or added by us on our own initiative, the matter is not properly before us.

Id. *Solberg*, 388 Md. at 292-293, 879 A.2d at 1021-1022.

Thus in the present case, under Maryland law, Petitioner was required to raise its alleged constitutional issues in its petition for certiorari to Maryland's Court of Appeals.

As this Court has held a failure to comply with state procedures in raising issues is a fatal flaw to the jurisdiction of this Court.

> "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. . . . When as here there can be no pretense the (state) Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this court accepts the decision whether right or wrong." (Citations omitted).

Wolfe v. State of North Carolina, 364 U.S. 177, 195 (1960).

Here, Appellant did not raise either of its constitutional arguments in its state court petition for certiorari and it only raised its due process argument in its Motion For Reconsideration. Thus Petitioner failed to follow Maryland procedural appellate practice and its Petition should be denied. Id. As this court said in *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945),

> "Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case

could have been brought here had the questions been raised prior to the original disposition."

Id.

II. THERE IS NO MERIT IN PETITIONER'S DUE PROCESS ARGUMENT

Petitioner's due process question is whether:

> " . . . The District Council violated Petitioner's due process rights guaranteed them in the Fourteenth Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights when the District Council decided that petitioner's proposed rubble fill would cause adverse effects greater than would be anticipated at other locations in the Rural Residential Zone prior to hearing evidence in oral argument."

Pet. at 11.

To support this argument, Petitioner cites an isolated sub-section of the Prince George's County Code and an isolated sentence in The District Council's interlocutory remand order. Pet. at 12. Then Petitioner rambles through a series of irrelevant quotes from cases, legal encyclopedia's, and treatises about de novo hearings (Pet. 12-15) and concludes that the District Council made a "decision concerning alleged cumulative adverse effects" without considering evidence introduced at a hearing on the record. Pet. at 15. Once the facts and sections of the Prince George's County Code omitted by Petitioner are properly identified, Petitioner's alleged due process claim evaporates because there simply was no final decision by the District Council on the merits of this case prior to oral

argument. Moreover, as the following illustrates, there is no new evidence introduced to the District Council. The appeal is based on evidence already in the record.

The following excerpts from subsections of the Prince George's County Code are relevant to the argument below and thus for the Court's convenience Respondent sets them out here.

> **Sec. 27-126. Office of the Zoning Hearing Examiner.**
>
> (a) The District Council shall establish the office of the Zoning Hearing Examiner and shall appoint one (1) or more Hearing Examiners to conduct public hearings in zoning cases listed in this Subdivision.
>
> **Sec. 27-127. Powers and duties to conduct hearings.**
>
> (a) The Zoning Hearing Examiner shall conduct hearings for the following categories of zoning cases:
>
> 2. Applications for special exceptions under Part 4, including applications for variances in conjunction with the Special Exceptions;
>
> **Sec. 27-129. Hearing Procedures**
>
> **(k) Case taken under advisement.**
>
> (1) Once a case has been fully presented, it shall be taken under advisement for the Examiner to render a decision. Thereafter, no new evidence may be entered into the record except:
>
> (A) If good cause is shown why the evidence was not previously presented into the record; or

(B) The evidence is presented pursuant to a remand of the District Council

Sec. 27-131. Oral argument and appeals from Zoning Hearing Examiner's decision.

(a) **Authorization.**

(1) With the exception of zoning cases for which an alternative appeal process is otherwise specified, any person of record or the People's Zoning counsel may file with the District Council, within thirty (30) days after the Zoning Hearing Examiner files his written decision in a zoning case:

(A) An appeal from the Zoning Hearing Examiner's decision in a special exception case finally decided by the Zoning Hearing Examiner;

(B) Exceptions to the Zoning Hearing Examiner's decision in any other zoning case; or

(C) A request for oral argument before the District Council on either (A) or (B), above.

(b) **Form and content of request.**

(1) Exceptions, appeals, and request for oral argument shall be submitted (in writing) to the Clerk of the District Council. A copy shall be sent by the submitter to all persons of record (by regular mail), and a certificate of service shall accompany the submission to the Clerk.

(2) Exceptions, appeals, and requests for oral argument shall be numbered in sequence and shall specify the error which is claimed to have been committed by the Examiner. Those portions of the record relied upon to support the claim shall be specified.

(f) **New Evidence.**

(1) Persons of record may not introduce evidence not already in the record. The Council may, however, either upon written request by a person of record or upon its own motion, remand a case to the Zoning Hearing Examiner for the purpose of reopening the record to receive and evaluate additional evidence. (See Section 27-133.) In addition, the Council may take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property, including the approval of a preliminary plat of subdivision.

Sec. 27-133. Remand.

(a) **In general.**

(1) Within the time specified for final decision, the District Council may remand any zoning case heard by the Zoning Hearing Examiner back to the Examiner for clarification or for additional testimony. The Council may also remand any Zoning Map Amendment of Special Exception for a de novo proceeding where there is good cause. Where additional testimony is taken upon remand, there shall be a new or revised decision from the Office of Zoning Hearing Examiner, which shall be subject to Section 27-131.

(d) **Time for final decision.**

(1) Whenever the District Council remands an application, the time limits on final action shall begin to run anew from the date of refiling the application with the District Council in accordance with the provisions of Section 27-132(d).

Sec. 27-135. Reconsideration and amendment of decisions.

(a) Reconsiderations and site plan amendments for Special Exceptions shall be as provided for in Part 4.

Sec. 27-327. Reconsideration of final decision.

(a) Once a final decision on a Special Exception application has been made, the decision may be reconsidered upon request filed by either the applicant or other person of record within (30) days of the final decision, if, based on the written request, whomever made the final decision (the Zoning Hearing Examiner or District Council) finds that there may have been an error in reaching the final decision that was caused by fraud, surprise, mistake, or inadvertence.

The Zoning Statute for Prince George's County Maryland is contained in subtitle 27 et seq. of the Prince George's County Code. Section 27-126 of the county code establishes the Office of the Zoning Hearing Examiner (ZHE) which pursuant to section 27-127, conducts hearings on applications for special exceptions for rubble fill landfills. Once the case is fully presented to the ZHE it is taken under advisement pursuant to section 27-129(k), and a final decision is rendered.

Section 27-131 allows administrative appeals to be taken from the ZHE's decision in the form of exceptions, and requests for oral argument can be made. The requests for exceptions, pursuant to Section 27-131(b), must be in writing specifying the error and the portions of the record before the ZHE that are relied on. Pursuant to sections 11-131(f) and 27-129(k) no new evidence is admitted, and only

evidence already in the record below can be introduced to the Council unless there is a remand back to ZHE, pursuant to Section 27-133(a). Where additional testimony is taken because of a remand, the ZHE enters a new or revised decision and pursuant to 27-133(a) and (d) the appeal process contained in 27-131, then begins anew. The Council then holds oral arguments and renders its decision in the form of an order along with findings and conclusions that support the denial or approval within the time limits contained in 27-132(d). The written decision of the Council, including its findings and conclusions, are then served upon all person of record. At this point the Applicant can file a Motion For Reconsideration pursuant to Sections 27-135 and 27-327 if the applicant believes that "error was caused by fraud, surprise, mistake or inadvertence."

The above process was followed in the present case. Evidence was placed into the record before the ZHE during 11 days of hearings. On March 29, 2002 the ZHE issued her decision denying the application as to the smaller parcel and granting it as to the larger parcel. On April 29, 2002 both parties filed an appeal by way of written exceptions detailing the evidence from the record they relied on and requesting oral arguments. Before oral arguments took place the District Council, Pursuant to section 27-133 of the county code, remanded the case to hear additional evidence on the issue of necessity. The ZHE held two additional days of testimony on the necessity issue and issued a new opinion pursuant to section 27-133(a) on May 1, 2003. This new opinion contained the same conclusions as ZHE's 2002 decision except that it included findings on the issue of necessity. Both parties again filed exceptions pursuant to section 27-131 and as

Petitioner admits a full hearing on all the issues in the case was held on September 22, 2003. Pet. at 5. The District Council's final order denying the application was filed with detailed explanations of its conclusions and findings. App. 1a. It was this final order signed on September 22, 2003 that was appealed to the Circuit Court by Petitioner. Pet. 5-6.

Thus what Petitioner doesn't tell the Court is that the June 22, 2002 remand order that it complained of was merely interlocutory in nature and that once ZHE issued its final opinion in May of 2003 there was a full opportunity for Petitioner to renew its appeal and argue any evidence from the record that it wished at the September 2003 hearing. In fact, that is exactly what Petitioner did. Moreover, Petitioner did not ask the District Council to reconsider its final order pursuant to Section 27-327 for "fraud, surprise, mistake, or inadvertence" and it was not until Maryland's Court of Appeals denied its petition for certiorari that Petitioner first argued that its due process rights were violated by the District Council's alleged failure to give Petitioner a hearing before deciding the case.

Petitioner's citation to Maryland cases that construed different county statutes has no bearing on the process in Prince George's County and at best its argument is disingenuous. The Prince George's County process provides for a review of evidence submitted during hearings before ZHE. There is no new evidence taken. The parties file written exceptions citing to the evidence they rely on and they can argue evidence already in the record at oral argument. This is exactly what was done in the present case.

Not only did the District Council follow the procedures set out in the Prince George's County Code, but there is also no doubt that the decision in the present case was correct. As the Court of Special Appeals said:

> "Maryland Reclamation itself actually provides some of best evidence that the proposed rubble fill will create uniquely adverse effects for it neighbors in Robshire Acres, Ramblewood, and Oak Grove. Admitting these effects, Maryland Reclamation justified them on a "containment" theory."

Pet. App. 18a.

III. THERE IS NO MERIT TO PETITIONER'S COMMERCE CLAUSE ARGUMENT

As discussed infra, Petitioner failed to raise its commerce clause argument before either Maryland's Court of Special Appeals or Maryland's Court of Appeals and this Court does not have jurisdiction to decide this issue. However, if this Court were to consider the commerce clause issue it would find there is no merit in Petitioner's argument.

Petitioner argues that Sections 27-406(g) and (h) of the Prince George's County Code unconstitutionally infringes on interstate commerce. According to Petitioner, these sections are unconstitutional because:

> "Specifically, 27-406 requires approval of a rubble fill application only upon a showing that there exists an actual deficit of rubble capacity needed for Prince George's County Rubble."

Pet. at 11.

In order to make its argument Petitioner attempts to extract isolated language from this Court's decision in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 387-390 (1994). There the Court analyzed a statute that "required all nonhazardous solid waste within the town to be deposited at the Route 303 Transfer Station." Id. A "tipping fee" had to be paid for trash that was handled by the transfer station. Id. Carbone operated a local recycling center in Clarkstown and then shipped the trash out of state. Id.

By requiring Carbone to send the local waste to the Transfer Center at an additional cost, the ordinance drove up the cost for out-of-state interests that disposed of Carbone's solid waste. Id. In addition, because all local non-recyclable waste had to go to a single designated facility, the ordinance deprived out-of-state businesses the chance to compete for local business. Id. Thus, *C&A Carbone* involved a local statute that attempted to prevent local trash from entering the market place unless it was locally processed by a designated facility.

In equating the Prince George's County Statute to the statute in *C&A Carbone* Petitioner argues that conditioning special exceptions on a showing of local need is a per se violation of the Commerce Clause because the conditions imposed by the zoning ordinance deprive individuals in Washington, D.C., Northern Virginia and other Counties in Maryland of "available rubble fill capacity." Pet. at 8.

This, of course, is untrue. There are no limitations on who can use Prince George's rubble fills. Rubble can be shipped from anywhere within or without the county into a Prince George's rubble fill. Moreover, 27-406(g) and (h) allow for more rubble fills once a need for more space is shown.

The point that Petitioner misses is that its arguments, if accepted, would render all zoning statutes constitutionally deficient. The purpose of every zoning statute is to provide orderly growth based on *local needs* and conditions and the Prince George's Statute is no different.

For example, designating a zone as agricultural or Rural Residential based on county needs limits land development and deprives entrepreneurs from Washington, D.C., Virginia and other counties of "available capacity" for commercial uses, but such zoning does not violate the commerce clause. Likewise limiting the number of gas stations or liquor stores in a zone based on a showing of local need is an acceptable zoning tool that effects the "available capacity" for such uses. Thus, there is no merit to Applicant's commerce clause arguments.

IV. MARYLAND RECLAMATION, INC. IS NOT A PARTY TO THIS CASE.

The Petitioner identified in the caption of the present case and at page 1 of the Petition is "Maryland Reclamation, Inc." However, it was Maryland Reclamation, LLC that filed the petition for certiorari and Motion To Reconsider in Maryland's highest court. Pet. App. 1a-2a. It was also Maryland Reclamation, LLC that participated before the lower courts. Pet. App. 3a, 23a, and 28a. Under Maryland law a limited liability company means " . . . a permitted form of unincorporated business organization". MD. CORPS. & ASS'NS CODE ANN. § 14-101(l). Thus Maryland Reclamation, Inc. cannot bring this Petition.

CONCLUSION

For all of the above reasons Respondent respectfully asks this Court to deny the petition for certiorari.

Respectfully submitted,

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APPENDIX A

[LOGO]

THE PRINCE GEORGE'S
COUNTY GOVERNMENT

Office of the Clerk of the Council
(301) 952-3600

September 24, 2003

RE: SE 4347 Maryland Reclamation, LLC (Remand)

NOTICE OF FINAL DECISION
OF THE DISTRICT COUNCIL

Pursuant to the provisions of Section 27-134 of the Zoning Ordinance of Prince George's County, Maryland requiring notice of decision of the District Council, you will find enclosed herewith a copy of the Council Order setting forth the action taken by the District Council in this case on September 22, 2003.

CERTIFICATE OF SERVICE

This is to certify that on September 25, 2003 this notice and attached Council Order were mailed, postage prepaid, to all persons of record.

/s/ Redis C. Floyd
Redis C. Floyd
Clerk of the Council

Case No.: S.E. 4347

Applicant: Maryland Reclamation, LLC

COUNTY COUNCIL OF
PRINCE GEORGE'S COUNTY, MARYLAND,
SITTING AS THE DISTRICT COUNCIL

ORDER OF DENIAL

IT IS HEREBY ORDERED, after review of the administrative record and consideration of argument from the parties, that Application No. S.E. 4347, for a special exception for a rubble fill on property described as approximately 131.5 acres of land in the R-R Zone, on the east side of Brown Station Road, to the north of Brown Road and approximately 2,700 feet south of White House Road, in Upper Marlboro, Maryland, is hereby:

DENIED, for the reasons stated in the findings of fact and conclusions of law attached hereto as Exhibit A, which are hereby adopted as the basis for denial of the application.

Adopted this 22nd day of September, 2003, by the following vote:

In Favor:	Council Members Shapiro, Bland, Dean, Dernoga, Exum, Harrington, Hendershot, Knotts and Peters
Opposed:	
Abstained:	
Absent:	
Vote:	9-0

COUNTY COUNCIL OF
PRINCE GEORGE'S
COUNTY, MARYLAND,
SITTING AS THE
DISTRICT COUNCIL
FOR THAT PART
OF THE MARYLAND-
WASHINGTON RE-
GIONAL DISTRICT
IN PRINCE GEORGE'S
COUNTY, MARYLAND

BY: /s/ Peter Shapiro
Peter A. Shapiro, Chair

ATTEST:

/s/ Redis C. Floyd
Redis C. Floyd
Clerk of the Council

S.E. 4347
Exhibit A

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The subject property, zoned R-R, includes about 131.5 acres, on the east side of Brown Station Road, north of Brown Road and about 2,700 feet south of White House Road. The site lies just west of the Ramblewood residential community and just east, across Brown Station Road, of the Robshire Acres community. The property was farmed for many years before the 1970s, was also mined for sand and gravel, and has been used recently as a Class 3 fill. The applicant here proposes use of the property as a rubble fill, which requires a special exception in the R-R Zone.

2. The Technical Staff and Planning Board recommended approval of the special exception, with conditions. Residents in the area and their civic and homeowners associations appeared in opposition. Staff and Planning Board did not (and were not able to) determine whether the proposed rubble fill is "necessary to serve the projected growth in Prince George's County," as must be proved under § 27-406(h) of the Zoning Ordinance. At the time of their reviews the District Council had not completed action on the Ritchie Reclamation application, S.E. 4408. Moreover, staff did not – and consequently Planning Board did not – apply correctly the proof requirements in § 27-406(h).

3. The chief reasons for neighborhood opposition to the application are the anticipated adverse effects (noise, odors, and visual effects) on residences and residential areas near the site and the truck traffic (and its perceived safety and congestion problems) from the operations. The record reflects, first, that the residential communities along Brown Station Road have been visited with more than their fair and reasonable share of mining and landfill uses, "temporary" in nature, over the last 30 years or more; second, that noise, odors, and visual effects from existing and past mining, landfill, and other resource recovery and solid waste disposal activities in the neighborhood, as well as from the power lines traversing the neighborhood and the constant truck traffic along Brown Station Road, have been continuing problems for the residents for many years; and third, that neighborhood opposition witnesses showed by substantial evidence that the proposed rubble fill operations will increase for years the adverse noise, odors, visual, and traffic safety effects

now present in the neighborhood from existing landfill and other operations.

4. The main reason the District Council must deny this application is that the applicant, even with staff and Planning Board assistance, did not prove that the proposed rubble fill is "necessary" to "serve" the County's "projected growth," within the meaning of § 27-406(h) of the Zoning Ordinance.

To make these proofs, a rubble fill applicant must show what the projected County growth in the next 15 years will be, how the proposed facility will "serve" that projected growth, and how the facility is "necessary" to serve that growth. Stated another way, and perhaps oversimplified, the requirement calls for a showing of how projected County growth will be adversely affected, if the proposed rubble fill is not approved. If projected County growth will not be affected by the presence or absence of the proposed facility, then it cannot be said, for purposes of § 27-406(h), that the facility is "necessary" to serve that growth.

These requirements were not correctly stated or addressed by the applicant, the Technical Staff, or the Planning Board. They also were not correctly applied by the Examiner.

Prior Proceedings

5. Application No. S.E. 4347 has been pending since April 1999. Delays in processing were caused by staff review requirements, postponements at the request of the applicant and others, and a remand by the District Council in 2002. The main reason for the delays in this case,

however, was that many hearings were required to complete the record of testimony before the Examiner. This case, in comparison to S.E. 4408, the rubble fill case on nearby Ritchie-Marlboro Road, a case reviewed at the same time as this one, had many more witnesses and many more hearings, and there was consequently some delay before the Examiner completed the review.

The S.E. 4347 applicant may complain that it was unfair for its final decision to be made after the S.E. 4408 case decision. The two applications were in a sense in competition, as to the "necessary to serve the projected growth" issue, and this application was filed months before S.E. 4408. But no unfairness in procedure was imposed in this case, S.E. 4347. The applicant here cannot show in the record a deliberate or wrongful delay caused by staff, Examiner, Council, or parties to the proceedings. Any complaint the applicant might have about procedural delays cannot be based upon a violation of its rights under the Zoning Ordinance or the Regional District Act, Art. 28, Md. Ann. Code. Moreover, the Council at this time cannot correct prior procedural delays.

Present Application

6. Both staff and Planning Board recommended approval of the application, with conditions. These recommendations were made prior to the full merits hearing before the Examiner, and neither the Technical Staff nor the Planning Board had the benefit of a full presentation of the evidence. Only Examiner and Council had that.

Moreover, all three reviewing entities – Technical Staff, Planning Board, and Zoning Hearing Examiner – have misinterpreted and misapplied the Zoning Ordinance

standards applicable in this case. The applicant here was required to prove general compatibility with adjacent properties and neighborhood, under § 27-317 of the Zoning Ordinance, and it was also required to prove that it met the special requirements for rubble fills in § 27-406. In particular, § 27-406(h) provides:

> When approving a Special Exception for a rubble fill, the District Council shall find that the proposed use is *necessary to serve the projected growth* in Prince George's County.

(Emphasis added.) Staff, Planning Board, and Examiner required a showing only that existing rubble fill capacity in the County will run out in the next 15 years. They did not then ask for proof of adverse effects on the County's projected growth. From the proof of likely exhaustion of capacity in 15 years, staff, Board, and Examiner concluded, without evidence, that the subsection (h) standard was satisfied. But the Ordinance section requires more than that.

7. The District Council remanded this case to the Examiner for a review primarily of the issue whether the proposed Brown Station Road rubble fill would be "necessary to serve . . . projected growth," under § 27-406(h). Staff on remand did an additional analysis, the applicant produced testimony from a solid waste management expert, and the case was returned to the Council. But neither staff nor applicant adequately addressed the "necessary to serve" issue, and the Examiner also misapplied it.

Findings and Conclusions

8. The District Council concludes that neither staff nor Planning Board nor applicant, even with the testimony of solid waste management expert Robert Brickner, showed that this proposed rubble fill is "necessary to serve the projected growth in Prince George's County." The staff reviewers and the applicant, as well as the Examiner, decided that this requirement, in § 27-406(h) of the Zoning Ordinance, was met if it were proved that existing fill capacity in the County would be exhausted in a few years (less than 15) and that there were no nearby fills outside the County to receive rubble after that. But they did not relate this finding about capacity to projected growth, and without proof that growth would diminish or otherwise be adversely affected, neither applicant nor staff showed what is required under subsection (h).

9. The staff analysis, initially and on remand, projected a number of "scenarios" for rubble fill capacity in Prince George's County in the next 15 years. Each scenario depends on approval of one or more of the pending applications, including S.E. 4408 and S.E. 4347. It is agreed by the parties, and the District Council finds, that rubble fill capacity in the County will be exhausted within 10 years, unless at least one of the pending applications is approved. But that is all the "scenarios" analysis shows: the analysis does not, without more, meet the requirements of § 27-406(h).

10. As the opposition points out, fill capacity outside Prince George's County must also be considered. The Examiner received evidence of existing and operating rubble fills outside the County, in Anne Arundel, but ultimately she decided that even those fill operations

would not offer capacity to make up for in-County facilities which would be exhausted. No one made a thorough examination of rubble fills or fill capacity in the surrounding jurisdictions, the Examiner did not require one, and the record has no evidence that reductions in fill capacity will adversely affect growth.

11. Neither staff nor applicant considered what will happen when in-County and nearby rubble fills reach their capacity, in the next 10-year period. It was not shown that the absence of rubble fill capacity at existing operational sites will have any effect, good or bad, on County building or County growth. No historical data was presented, to show that growth in the past has diminished because of a lack of rubble fill capacity. No predictive analyses or models were offered, to show that growth in the future – growth of any kind, commercial or industrial or residential or otherwise – would be affected, in any way. Staff, applicant, and Examiner concluded that if and when in-County rubble fill capacity is exhausted, then (ipso facto, or by definition) growth will be affected. They did not consider, for example, that Montgomery County has no rubble fills at all, but continues to grow, or that all Maryland counties have enjoyed some growth since the 1990s, yet very few have rubble fills.

12. The Zoning Ordinance requires more proof than what the applicant offered. This applicant could not and did not prove that its proposed rubble fill – even without considering other pending rubble fill applications – is necessary to serve Prince George's County's projected growth.

13. On the "necessary to serve" issue, the District Council also notes that S.E. 4408, the Ritchie Reclamation

ruble fill application in the neighborhood just to the west of the Brown Station Road neighborhood, was recently approved. When the applicant there obtains the necessary State permit approvals, then the S.E. 4408 rubble fill will add sufficient capacity to provide in-County facilities, to "serve" projected County growth, until about 2015 or 2016.

14. The District Council further concludes, as argued by opposition residents, particularly those in the Ramblewood and Robshire Acres communities, that the applicant did not prove, as is required by § 27-317 of the Zoning Ordinance, that the proposed rubble fill at this location will not cause adverse effects greater than would be anticipated at other locations in the R-R Zone. This proposed S.E. 4347 site is much closer to established residential subdivisions than other R-R sites, including the S.E. 4408 site recently approved by the District Council. Visual, noise, and odor effects from a rubble fill at the subject location will be much greater than would be anticipated at the S.E. 4408 property and other R-R zone locations. This proof in the record offers an additional reason to deny the application.

15. Because the applicant did not prove that its proposed rubble fill facility is "necessary to serve the projected growth in Prince George's County," § 27-406(h), and because the applicant did not show that anticipated adverse traffic, noise, odor, and visual effects at this location will be no worse than they would be at other R-R locations in the County, § 27-317, the application must be denied.

APPENDIX B

[LOGO]

THE PRINCE GEORGE'S
COUNTY GOVERNMENT

Office of the Clerk of the Council
(301) 952-3600

CORRECTED COVER SHEET

November 18, 2004

RE: SE 4347 Maryland Reclamation, LLC (Remand)

NOTICE OF FINAL DECISION
OF THE DISTRICT COUNCIL

Pursuant to the provisions of Section 27-134 of the Zoning Ordinance of Prince George's County, Maryland requiring notice of decision of the District Council, you will find enclosed herewith a copy of the Council Order setting forth the action taken by the District Council in this case on November 8, 2004.

CERTIFICATE OF SERVICE

This is to certify that on November 18, 2004 this notice and attached Council Order were mailed, postage prepaid, to all persons of record.

/s/ Redis C. Floyd
Redis C. Floyd
Clerk of the Council

Case No.: S.E. 4347

Applicant: Maryland Reclamation, LLC

COUNTY COUNCIL OF
PRINCE GEORGE'S COUNTY, MARYLAND,
SITTING AS THE DISTRICT COUNCIL

ORDER SUPPLEMENTING ORDER OF DENIAL

IT IS HEREBY ORDERED, after remand of this case from the Circuit Court for Prince George's County and consideration of additional argument from the parties, that, for the proposed rubble fill on property described as approximately 131.5 acres of land in the R-R Zone in Upper Marlboro, on the east side of Brown Station Road, north of Brown Road and approximately 2,700 feet south of White House Road, the supplemental conclusions attached as Exhibit A are hereby ADOPTED; and it is

FURTHER ORDERED, that the District Council's findings and conclusions in the first Order of Denial, filed September 25, 2003, are hereby READOPTED; and it is

FURTHER ORDERED, that the District Council's denial of Application No. S.E. 4347 is hereby REAFFIRMED, for the reasons given below and the reasons given with the first Order of Denial; and it is

FURTHER ORDERED, that the Clerk transmit this Order to the Circuit Court for Prince George's County for further proceedings.

ORDERED this 8th day of November, 2004, by the following vote:

In favor: Council Members Knotts, Bland, Dean, Exum and Peters

Opposed:

Abstained:

Absent: Council Members Dernoga, Harrington and Hendershot

Vote: 5-0

COUNTY COUNCIL
OF PRINCE GEORGE'S
COUNTY, MARYLAND,
SITTING AS THE
DISTRICT COUNCIL
FOR THAT PART
OF THE MARYLAND-
WASHINGTON RE-
GIONAL DISTRICT
IN PRINCE GEORGE'S
COUNTY, MARYLAND

BY: /s/ Tony Knotts
Tony Knotts, Chairman

ATTEST:

/s/ Redis C. Floyd
Redis C. Floyd
Clerk of the Council

S.E. 4347
Exhibit A

SUPPLEMENTAL CONCLUSIONS

S1. This case is here on remand from the Circuit Court for Prince George's County. The Court asks the Council for clarification of the meaning of § 27-406(h) of the Zoning Ordinance; as applied to this application. Section 27-406(h) provides:

> When approving a Special Exception for a rubble fill, the District Council shall find that the proposed

> use is *necessary to serve the projected growth in Prince George's County.*

(Italics added.) The italicized language, added to the Zoning Ordinance on November 17, 1992, in Council Bill 85-1992, sets out the standard which all applicants must meet to obtain a special exception for a rubble fill. The Circuit Court has asked the District Council to further explain why this applicant did not satisfy § 27-406(h).

S2. The applicant argues that the terms "necessary to serve the projected growth" were explained in *Brandywine Enterprises, Inc. v. County Council,* 117 Md.App. 525, 540-41, 700 A.2d 1216 (1997), as follows:

> The zoning hearing examiner noted that the terms "need" and "necessary" were not defined by the Zoning Ordinance but, citing *Lucky Stores, Inc. v. Board of Appeals for Mont. Co.,* 270 Md. 513, 312 A.2d 758 (1973); and *American Oil Co. v. Board of Appeals for Mont. Co.,* 270 Md. 301, 310 A.2d 796 (1973), went on to state that such terms had been judicially defined to mean expedient or reasonably convenient and useful to the public. We agree with the District Council that the term "necessary" under the Zoning Ordinance means necessary rather than reasonably convenient or useful. *Lucky Stores* and *American Oil Co.* both involved the identical Montgomery County statute which defined "need" in terms of public convenience and service. *Lucky Stores,* 270 Md. at 524-25; *American Oil Co.*, 270 Md. at 308. That statute did not utilize the term "necessary." In the instant case, the technical staff and the parties all proceeded *as if the determination of need involved a determination of whether there would be an actual deficit of rubble fill capacity within the next fifteen years.* We believe that this

> is the most reasonable interpretation of the needs analysis provision. Given the flaws in the technical staff's needs analysis, the question of need was fairly debatable.

(Italics added.) The Court's statement about a 15-year capacity deficit was not part of the holding in the *Brandywine* case. The statement offers only a preliminary reading of the "necessary to serve the projected growth" requirement in § 27-406(h), at a time when the Court did not have to interpret its provisions and the parties did not argue the point. But the District Council has held in all rubble fill cases since 1997 that the "necessary to serve the projected growth" standard requires considerably more than proof of a projected future deficit in rubble fill capacity within the County.

S3. The Court's statement in the 1997 *Brandywine* decision was predicated on the state of the administrative record, not the terms of the Zoning Ordinance or argument from the parties. The Court held in effect that even if the only proof needed was a showing of future in-County deficits, the applicant had not met the standard. But in the present case, the District Council and reviewing Courts must interpret and apply the "necessary to serve the projected growth" standard to the applicant's evidence when the meaning of the standard is directly in question.

S4. The Examiner concluded that the terms "necessary to serve the projected growth" required only an analysis of "accommodation." But the Examiner's reading of § 27-406(h) essentially nullifies its requirements: a rubble fill applicant will always be able to show that its proposed operation affords some convenience and accommodation to the public, and neither staff nor opposition would be able to prove otherwise. No special exception could ever be denied on that basis, and the "necessary to

serve the projected growth" standard would be meaningless, without effect. To satisfy § 27-406(h), an applicant must prove much more than public convenience and accommodation.

S5. The Council has determined in this and in two prior rubble fill cases, S.E. 4355 (Brandywine) and S.E. 4408 (Ritchie Reclamation), that § 27-406(h) requires application of the words "necessary," "serve," and "projected growth in Prince George's County." To prove what is called for in § 27-406(h), a rubble fill applicant must address by evidence these three questions:

(1) What will projected growth in Prince George's County be, during the period of operation of your rubble fill?

(2) How will your rubble fill operation serve that projected growth?

(3) Why should the District Council conclude that your fill operation will be necessary to serve the projected growth?

These three questions, these elements of proof, are required for every application, and the Council has consistently used them in rubble fill cases.

S6. The purpose of § 27-406(h) is shown in the file of the enacting bill, CB-85-1992. The bill's agenda item summary states as follows:

> Staff explained that this legislation is intended to ensure that the rubble fills approved in Prince George's County are necessary to *serve the needs of this County, and not the needs of the entire region.* The sponsor [Mr. Wineland] added that since Federal law prohibits the County from restricting the use of privately-owned rubble fills;

> requiring a needs analysis prior to Special Exception approval will help preserve this resource and protect the citizens of the County.

(Italics added.) These same purposes are intended in this case. The proposed rubble fill is a County resource; its operation will have adverse effects in the neighborhood, as do all rubble fills; and consequently the Council requires proof that the facility will actually serve – and will be necessary to serve – the County's projected growth. This rubble fill special exception application must be denied because the applicant did not prove (and did not attempt to prove) that its proposed operations are necessary to serve the projected growth in Prince George's County.

S7. The applicant's, expert for § 27-406(h), Mr. Robert Brickner, was qualified to give opinions testimony in the field of solid waste management. He testified directly about the "necessary to serve the projected growth" standard, giving the opinion that the applicant met the test. Using staff data, Mr. Brickner concluded that under any of the likely "scenarios" (staff's analysis included a number of likely outcomes, assuming the opening and closing of other fill operations), Prince George's County would within 15 years run out of rubble fill capacity in existing land fills. The applicant argues that the Brickner opinion is all that § 27-406(h) requires.

S8. But neither the Brickner opinion nor the staff's scenarios analysis – nor the Examiner's conclusions – state and apply the § 27-406(h) standard correctly. The record includes their statements about anticipated County growth and how the growth will generate thousands of tons of rubble, but then there is no connection in the proofs, no showing how the applicant's operations will "serve" and be "necessary" to serve the growth. Mere proofs – which come from staff, not the applicant – that

rubble fills in Prince George's County will run out of capacity at some future date does not show that this proposed operation (or any other) is "necessary."

It is common knowledge and is reflected in this record that most Maryland jurisdictions, including Montgomery and Howard counties, do not have rubble fills within their boundaries but have had substantial growth for many years. The applicant's proofs are insufficient because it did not show that the projected using up of in-County rubble fill capacity will have any effect on growth, good or bad or otherwise. The "necessary" term in § 27-406(h) must require – if it means anything – a showing by the applicant how the absence of its fill operation will affect growth. If there will be none, if growth as projected will proceed in the same way with or without the applicant's rubble fill, then it cannot be said and the applicant cannot claim that the fill is "necessary" to serve projected County growth.

S9. The District Council firmly believes – and has stated in the two other § 27-406(h) cases decided since 1997, S.E. 4355 and S.E. 4408 – that a rubble fill application should not be approved unless the record shows some likely adverse effects on projected County growth without the proposed operation. That is what the language of § 27-406(h) means, as a matter of ordinary signification of the words, and that is what the legislative history indicates. Because this applicant did not prove that its operations would have any effects on projected County growth, the applicant did not meet the burden of proof imposed in § 27-406(h). Because the proofs were not submitted, the District Council was required to deny the S.E. 4347 application.